No. 75-4201

In the Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (App. A, *infra*, pp. 1a-22a) is reported at 392 F. Supp. 358. The orders of the Interstate Commerce Commission in Ex Parte No. 305, *Nationwide Increase of Ten Percent in Freight Rates and Charges, 1974* (Appendices D through M, *infra*, pp. 27a-111a) are unreported.

JURISDICTION

The judgment of the district court (App. B, *infra*, pp. 23a-24a) was entered on April 22, 1975. The notice of appeal was filed on June 20, 1975 (App. C, *infra*, pp. 25a-26a). By order of August 12, 1975, the Chief Justice extended the time for docketing the appeal to and including September 18, 1975. The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b).[1] *Aberdeen & Rockfish R.R.* v. *SCRAP*, No. 73-1966, decided June 24, 1975.

QUESTION PRESENTED

In April 1974 the Nation's railroads sought a general rate increase of 10 percent, representing to the Commission that at least part of the increase was needed to provide funds for maintenance and capital improvements that had been delayed. The Commission found that the increase appeared to be unjust and unreasonable unless the railroads devoted the bulk of the new revenues to these purposes. The railroads then filed new tariffs, which are subject to Commission orders ensuring that the increased revenues will be put to the proposed use.

The question presented is whether the Commission has the power to issue such orders, as a condition of not suspending proposed rate increases.

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[1] Pub. L. 93-584, 88 Stat. 1917, provides that after March 1, 1975, review of Interstate Commerce Commission orders is in the courts of appeals, with review in this Court by certiorari. The instant case was filed in the three-judge district court prior to March 1, 1975, and the old procedure therefore governs.

STATUTES INVOLVED

Section 15(7) of the Interstate Commerce Act, 24 Stat. 384, as amended, 49 U.S.C. 15(7), provides:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare,

charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 15a(2) of the Interstate Commerce Act, as added by 41 Stat. 488, and amended, 49 U.S.C. 15a(2), provides:

> In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

STATEMENT

In April 1974 the Nation's railroads (including appellees, the Chessie system)[2] filed a joint petition seeking permission to file tariffs embracing a 10 percent increase in the level of their freight rates.[3] The petition stated that "massive additional expenditures are required for maintenance and capital improvements"; the railroads asserted that sums in the billions of dollars were required to be devoted to such purposes.[4] In a statement responding to opposition

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[2] The "Chessie system" includes the Chesapeake and Ohio Railway Company, the Baltimore and Ohio Railroad Company, and the Western Maryland Railway Company, the three appellees here.

[3] The Long Island Rail Road did not join this request (App. F, *infra*, p. 41a, n. 1). The Commission allowed new tariffs to become effective on 30 days' notice. Apps. D and E, *infra*, pp. 27a-40a.

[4] The petition was supported by pertinent excerpts from a publication entitled "The American Railroad Industry: Prospectus," a report of America's Sound Transportation Review Organization, June 30, 1970, compiled for the Association of American Railroads (The "ASTRO Report"). This report estimated that the Nation's railroads will require expenditures exceeding $3 billion per year for each of the next ten years for maintenance and capital improvements.

to the increase, the railroads (including the Chessie), reaffirmed their earlier statements that a principal justification for the increase was their need to obtain additional revenues necessary to carry out deferred maintenance of plant and equipment and to make capital improvements.

On June 3, 1974, the Commission entered the first of the four orders attacked in the court below (App. F, *infra*, pp. 41a-54a). The Commission stated that in light of the inadequate service provided by the railroads and the danger of further deterioration, the railroads needed to generate additional revenues to improve service. It concluded that while the 10 percent increase would provide such additional funds, the increase would appear to be unjust and unreasonable without assurance that the new revenues would be used to improve service, as the railroads had asserted was necessary. Accordingly, the Commission suspended the tariffs embracing the increase, but authorized the railroads to file new tariffs subject to conditions providing that most of the increase must be spent on deferred maintenance and delayed capital improvements.[5] This order was served on June 4, and the next day all the Nation's railroads, including the Chessie system, filed new tariffs pursuant to the terms and conditions of the June 3 order. The

[5] The conditions are reprinted in App. F, *infra*, pp. 45a-49a.

Commission did not suspend them and they became effective.[6]

On July 18, 1974, the Commission entered the second order at issue (App. G, *infra*, pp. 55a-76a). This order clarified the June 3 order by defining the terms "deferred maintenance" and "delayed capital improvements." The Commission also established accounting and reporting requirements so that it could verify compliance with the June 3 order.

On July 30, 1974, Chessie requested the Commission to amend its orders to provide that a railroad without "deferred maintenance" or "delayed capital improvements," as defined, could expend for any valid corporate purpose the funds generated by the increase. Chessie expressed concern that it had no "deferred maintenance" or "delayed capital improvements" and, therefore, would be unable to make use of the increase.[7] In addition, Chessie's petition raised for the first time the argument that the Commission is without power to impose such conditions. The Nation's other railroads also filed a joint petition for reconsideration and clarification, but did not challenge the Commission's power to impose conditions.

[6] By order of June 6, 1975, the Commission extended until April 30, 1976, the effectiveness of these interim increases. See App. M, *infra*, pp. 106a, 109a.

[7] Chessie argued that on May 13, 1974, its boards of directors had approved a $124 million capital improvement program. Under the Commission's orders, only capital improvements authorized after June 1, 1974, could be paid for with funds from the rate increase.

The Commission's order of August 9, 1974 (App. H, *infra*, pp. 77a-84a), while denying all petitions for reconsideration, further clarified the Commission's decisions by providing that carrier management would retain discretion to decide what projects meet the definitions of deferred maintenance and delayed capital improvements and by providing that railroads need not obtain Commission approval for particular projects. The Commission also recognized that some railroads, in anticipation of the increase, already had initiated improvement projects. In order to take account of this, the Commission allowed each railroad to count, as delayed capital improvements, projects to which funds initially were committed after January 1, 1974. This plan was designed to allow railroads to use old revenues for ordinary expenditures or projects already planned, while diverting the new revenues to supplemental improvements.

Chessie brought this suit on August 15, 1974, seeking to set aside the Commission's orders of June 3, July 18, and August 9. On August 18 District Judge Merhige issued a temporary restraining order prohibiting the Commission from enforcing its orders against Chessie.

On August 16, 1974, most of the Nation's railroads, but not Chessie, filed with the Commission another petition for clarification and modification of the July 18 and August 9 orders. On August 22 the Commission reopened the matter (App. J, *infra*, pp. 93a-

94a). It held oral argument on August 27, at which, by order of the Commission (App. K, *infra*, pp. 95a-97a), counsel for Chessie and the other railroads appeared.

On October 3, 1974, the Commission entered an order substantially modifying the conditions established by the prior orders (App. L, *infra*, pp. 98a-105a). The October 3 order provided (*id.* at 104a):

> * * * That railroad respondents, if any, which are unable to use the full amount of the funds generated by the increase for deferred maintenance or delayed capital improvements, as defined in this proceeding, may expend such funds for new and additional capital improvements providing advance approval is obtained from the Commission * * *.

Chessie amended its complaint to challenge the October 3 order as well. It claimed that the new order would not help it because its maintenance and capital projects could not qualify as "new and additional capital improvements." Chessie never sought the Commission's opinion on this matter, however, and never sought permission to proceed under the October 3 option.[8]

The district court recognized that the Commission's orders "are a well-intentioned effort to cope with the vexatious deterioration of track and equipment that saps the ability of the nation's railroads to serve the public adequately" (App. A, *infra*, p. 22a), and

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[8] Seventeen railroads have been granted authority under the October 3 order; six have been denied such authority.

that Chessie's facilities, like those of virtually all the Nation's railroads, "require additional maintenance and improvement" (*id.* at 15a). It concluded, however, that "Congress has not authorized the Commission to control a carrier's expenditure of funds as a condition to withholding the suspension of rates" (*id.* at 22a) and, accordingly, enjoined the Commission from restricting Chessie's expenditure of the revenues derived from the increase.[9]

THE QUESTION IS SUBSTANTIAL

This appeal presents a question of first impression and paramount importance: can the Commission, incident to its power to suspend or not to suspend proposed rates, direct regulated carriers to make specified uses of the funds generated by a rate increase, when the uses specified are broad in scope, designed to improve service to the public, and calculated to ensure that expenditures are made for the purposes specified by the carriers themselves as justifying the increase. In our view, the Interstate Commerce Act does not leave the Commission powerless to ensure that railroads, collecting increased rates only by the Commission's permission, will devote the revenues to the purposes for which, they say, they needed the money. The district court, we submit, erred in holding otherwise.

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[9] The court upheld the Commission's authority to require reporting of income and expenditures of funds derived from the increase (*id.* at 22a).

1. Railroad plant and equipment is deteriorating rapidly, and it has become clear that every means of improving rail facilities must be utilized if the Nation's railroads are to survive. The industry itself has documented this problem in great detail, which it has pressed upon the Commission.[10] Large quantities of public funds recently have been authorized for expenditures on rail plant and equipment,[11] and many bills now pending before Congress would authorize even greater sums for this purpose.[12] The rail system of the entire Northeast region soon is to be turned over to a new corporation heavily supported by the Government; the Northeast railroads failed, in large measure, because of a vicious circle of deteriorating

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[10] *E.g.*, the "ASTRO Report", *supra* n. 4.

[11] *E.g.*, Pub. L. 94-25, 89 Stat. 90, the "Amtrak Improvement Act of 1975" (May 26, 1975) (authorizing more than $1 billion to be spent over the next 2¼ years for operating and capital expenditures of the National Railroad Passenger Corporation); Pub. L. 93-236, 87 Stat. 985, 45 U.S.C. (Supp. III) 701 *et seq.*, the "Regional Rail Reorganization Act of 1973," (authorizing funds for the development and improvement of a Northeastern rail system under the Consolidated Rail Corporation). See generally *Regional Rail Reorganization Act Cases*, 419 U.S. 102.

[12] *E.g.*, S. 1730, 94th Cong., 1st Sess. (1975), the "Emergency Rail Transportation Improvement and Employment Act of 1975," passed by the Senate (authorizing $700 million for railroad maintenance and improvement and related materials and equipment assistance); H.R. 8672, 94th Cong., 1st Sess. (1975), the "Emergency Rail Transportation Improvement and Employment Act of 1975," pending before the House Committee on Interstate and Foreign Commerce (authorizing $240 million in maintenance and improvements funds to railroads in reorganization, Amtrak, and ConRail).

plant, inability to compete with other modes of transportation, and consequent inability to raise funds to pay for maintenance and capital improvement.

The need for railroads to apply their own funds to maintenance and improvement projects is clear. The railroads—including Chessie—acknowledged and relied upon this in their application for rate increases, and the Commission's orders do no more than attempt to ensure that a portion of the proceeds from that rate increase will be so applied. Only Chessie has challenged that attempt. If the Chessie is correct, it will be impossible, for all practical purposes, for the Commission to ensure that railroads devote revenues to the purposes claimed to justify the increase. The Commission concluded that an increase of more than three percent appeared to be unjust and unreasonable *unless* the new revenues were used for deferred maintenance and capital improvements. Chessie did not dispute this assessment in the district court. The Commission was required to devise some means to ensure that the new revenues were expended for that purpose; if they were expended for any other purpose the rates would be unjust and unreasonable.

2. The Commission's power to impose pre-expenditure controls necessary to ensure that the funds are dedicated to the purposes for which they were sought is conferred by Section 15a(2) of the Act (49 U.S.C. 15a(2)), in conjunction with Section 15(7) (49 U.S.C. 15(7)), which establishes the Commission's power to suspend proposed tariffs. Section 15a(2)

directs the Commission, "[i]n the exercise of its power to prescribe just and reasonable rates," [13] to "give due consideration, among other factors, * * * to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service * * *." The conditions imposed by the Commission in this case make it more likely that the public will receive the "adequate and efficient railway transportation" for the provision of which the increase was authorized. The orders make meaningful the Commission's authority to consider quality of service in determining what is a just and reasonable rate. The Commission could have blocked all increases by suspending under Section 15(7), explaining that it was doing so because there was no assurance the railroads would spend the additional funds for the only purpose that would justify the increased rates. The Commission, we submit, is entitled to use some less intrusive—but more effective—method of exercising its power of supervision under Section 15a(2).

Although the precise question of the scope of the Commission's power to impose conditions under Section 15a(2), in lieu of suspending under Section 15(7), is one of first impression, other courts have interpreted similar statutes to empower regulatory agencies to impose conditions upon their authorization

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[13] Under Section 15a(1), the term "rates" used in Section 15a "means rates, fares, and charges, and all classifications, regulations, and practices relating thereto."

of a fare increase. For example, *D.C. Transit System* v. *Washington Metropolitan Area Transit Commission*, 466 F.2d 394, 412 (C.A.D.C.), held, construing language functionally identical to that of Section 15a(2): "We perceive no legal barrier to an order by the Commission, securely founded upon an evidentiary record, preconditioning a fare raise upon terms calculated to safeguard the public interest in economical, efficient and adequate transportation. [Footnote omitted.] The legislative imposition of a grave responsibility ordinarily carries with it, as a matter of necessary implication, power to employ the means by which it may be discharged." [14] Indeed, as to the effect on the prerogatives of management, the power to deny an increase ultimately is the more coercive and intrusive.

In sum, the Commission has not attempted here

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[14] Numerous state court decisions to the same effect are cited in *D.C. Transit*, *supra*, 466 F.2d at 412, n. 127. These decisions make it clear that a regulatory commission's power to condition an increase upon terms calculated to safeguard the public interest in economical and adequate service depends on the presence or absence of language comparable to the "public interest" standard of Section 15a(2). The Supreme Court of Florida, for example, recently upheld the power of the Florida Public Service Commission to withhold a telephone rate increase pending service improvements. *United Tel. Co. of Florida* v. *Mayo*, 215 So. 2d 609, 610, appeal dismissed, 394 U.S. 995. The court expressly relied upon a statute authorizing the Commission to consider efficiency, sufficiency and adequacy of facilities provided and services rendered (Fla. Stat. Ann. 366.041 (1968)), and overruled a contrary decision rendered prior to enactment of the statute.

to exercise an "unfettered capacity for requisitioning investment of capital" or to require purchases of land and material (cf. *Interstate Commerce Commission* v. *United States ex rel. Los Angeles*, 280 U.S. 52, 70); nor has it tried to order a railroad to supply itself with a certain type of car (cf. *United States* v. *Pennsylvania R.R.*, 242 U.S. 208). The Commission has required carriers to expend funds they said they needed to spend for the purpose they stated. In effect, the Commission has simply held the railroads to their word. The Commission did not assert any broad authority to control management decisions since the decision regarding why and for what purpose additional funds were needed was a decision the railroads themselves made. If the railroads are dissatisfied with the Commission's conditions, they retain the right to decline to increase their rates, thereby escaping the effect of the conditions and returning themselves to the same position in which the Commission could have placed them by suspending under Section 15(7).

3. Chessie argued in the district court that the Commission's orders impinged on the prerogatives of management and would require wasteful use of funds or nonuse of funds. It contended that it has no "deferred maintenance" or "delayed capital improvements," as the Commission has defined those terms; and it requested the district court to set aside the Commission's orders on the ground that they are

arbitrary and unwise. We expect Chessie to repeat those arguments here.[15]

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[15] Although, in the posture of this case, Chessie's argument that the Commission's orders are unwise or misguided is not pertinent, we offer the Court a precis of our views.

The Commission has defined "deferred maintenance" in a way that includes all "accrued deterioration" in a railroad's plant and equipment that makes its service "partially or wholly inadequate." As the district court observed, derailments over the Chessie system increased from 87 in 1964 to 240 in 1973 (App. A, *infra*, p. 15a), an increase that bespeaks "accrued deterioration" of its roadbed. Other profitable railroads have reported to the Commission large amounts of deferred maintenance; the Commission informs us that the Norfolk & Western Railway reported $64,060,000 as of December 31, 1974, the Southern Railway $32,854,000, and the Union Pacific R.R. $8,722,000. The Nation's railroads together reported deferred maintenance of $2,898,000,000 as of June 30, 1974, and over the next six months, operating under the Commission's orders, that backlog had decreased only to $2,792,600,000. There are similar figures for "delayed capital improvements," which are defined as desirable projects for which commercial financing is not available.

Chessie has contended that it has no "deferred maintenance" or "delayed capital improvements" as the Commission has defined those terms; consequently, the sums it collects will be unusable unless it is released from the Commission's orders. Chessie asserts only two grounds for its contention: (1) that it embarked upon a capital improvements program prior to the cut-off date in the Commission's orders, and (2) because it is a solvent railroad, commercial financing is available for its projects, albeit on unacceptable terms. These arguments are insubstantial. Chessie's capital improvements program was approved by its boards of directors on May 13, 1974. Although the Commission's initial cut-off date was June 1, 1974, it has changed that date to January 1, 1974, so that Chessie's capital improvements program qualifies as a program for purposes of the Commission's orders. As to the second point, Chessie's position with respect to the availability of commercial financing is untenable. There is no support for Chessie's view that commercial financing must be *absolutely* unavailable. Commercial financing is "unavailable," for the purposes of the Commission's orders, if the terms of that financing would make it commercially unacceptable to reasonable and prudent managers. The Commission has expressly reserved to the railroads "the management of each railroad in the exercise of its proper and prudent managerial functions" (App. H, *infra*, p. 81a).

The district court did not reach Chessie's arguments in this regard. It held instead that the imposition of *any* condition is beyond the Commission's power. The sole question presented here is thus a question of power, a question that does not turn on the wisdom or the manner of its exercise in the particular facts of this case. We submit that the Commission has the power to require the carriers to expend the additional funds to fulfill the very needs the carriers asserted in justification of the rate increases that generated those funds.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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SEPTEMBER 1975.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 74-0370-R

[Filed Apr. 22, 1975, Clerk, U. S. Dist. Court, Richmond, Va.]

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, and WESTERN MARYLAND RAILWAY COMPANY, PLAINTIFFS

—*v*—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

(Argued December 20, 1974
Decided April 22, 1975)

Before BUTZNER, Circuit Judge, and MERHIGE and WARRINER, District Judges

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BUTZNER, Circuit Judge:

In this petition for review of a series of orders of the Interstate Commerce Commission in Ex Parte No. 305, *Nationwide Increase of Ten Percent in Freight Rates and Charges, 1974*, the Chessie system lines challenge the power of the Commission to condition the refiling of a rate increase, without investigation or suspension, on the expenditure of revenue derived from the increase in the manner directed by the Commission.[1] We conclude that the Commission lacks statutory authority to order a railroad how to spend its revenue, and we hold that this condition should not be enforced against the Chessie system. Chessie also charges that the Commission unlawfully required it to file certain reports. We hold that the orders to furnish the requested information are incidental to the Commissions' authority to suspend the proposed rate increases and are therefore not reviewable.

I

In April 1974 Chessie and all other railroads, except the Long Island, petitioned the I.C.C. for a 10 percent increase in freight rates. Among the reasons cited for the increase was the statement that "billions of dollars are needed immediately and in the coming decade for maintenance and improvement of the Nation's rail transportation plant." A number

[1] The Chessie system lines consist of the Chesapeake and Ohio Railway Company, the Baltimore and Ohio Railroad Company, and the Western Maryland Railway. For the sake of brevity we shall refer to them as Chessie.

of shippers protested, so the Commission did not allow the carriers to initiate the proposed tariffs on short notice. The railroads again filed for an increase in May. On June 3 the Commission acknowledged the railroads' need for an increase but ruled that "if the schedules were permitted to become effective as filed and without conditions designed to promote service improvements, the increases proposed would be unjust and unreasonable and contrary to the dictates of the national transportation policy." Accordingly, it suspended the proposed tariff and at the same time authorized the railroads to refile, incorporating conditions which would assure that the additional revenue would be expended for capital improvements and deferred maintenance of plant and equipment.[2]

[2] The conditions imposed by the June 3 order are:

"1. On or before August 19, 1974, each carrier shall provide this Commission (a) with an estimate of the costs of deferred plant and equipment maintenance as of June 30, 1974; number and percent of bad order cars by type; and miles of track by class on which slow orders were in effect. The estimate of deferred maintenance should be classified to show amounts for equipment by type of cars, locomotives plant, including yard and running track, and other similar classes of property and facilities; (b) with a report of the annual maintenance and capital expenditures for the years 1971-1973, inclusive, and the 1st and 2nd quarters of 1974. A report of estimated maintenance and capital investments shall be provided for the 3rd and 4th quarters of 1974 and the first two quarters of 1975.

"2. All railroads shall maintain a monthly record of the increased freight revenues derived from the in-

The railroads, including Chessie, then cancelled the prior increase and on June 5, 1974, refiled in accordance with the conditions of the June 3 order. However, on July 18 the Commission clarified its June 3 order. It allowed up to 3 percent of the revenue derived from the rate increase to be applied to higher material and supply costs, other than fuel. It required the railroads to expend the balance of the new revenue, less the income taxes attributable to it, for deferred maintenance and delayed capital improvement. For the purposes of the order, the Commission narrowly defined the term "deferred maintenance" as accrued deterioration producing a severe adverse effect on railroad operations. It also prohibited expenditure of the funds for any capital

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creases by months. The increased freight revenues may be estimated if the procedure for the estimations is explained.

"3. Revenues generated by the increases should be expended for capital improvements and deferred maintenance of plant and equipment and the amount needed for increased material and supply cost, other than fuel. A record of such expenditures shall be maintained on a monthly basis.

"4. At the end of the 3rd, 6th, and 9th months following the effective date of the increases, each carrier shall provide this Commission with an estimate of the freight revenues generated by the increases. Additionally, each carrier shall report the amount of expenditures made for deferred maintenance of plant and equipment, *e.g.*, by type of car, track, cross ties, etc., as well as amounts expended for capital improvements by type of project. Furthermore, each carrier shall report the amount of unexpended funds derived from the authorized increases and how those funds are to be expended."

improvements that had been scheduled or otherwise committed as of June 1, 1974.[3]

Protesting that it had neither deferred maintenance nor delayed capital improvements as defined by the Commission, Chessie petitioned for an amendment to the July 18 order that would allow it to expend the additional funds for any valid corporate purpose. On August 9 the Commission denied Chessie's petition

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[3] The July 18 order defined "deferred maintenance" and "delayed capital improvements" as follows:

"For purposes of this order, deferred maintenance is defined as the accrued deterioration or deficiency in the physical operating condition of railroad track structures, cars and locomotives, and other property used in the provision of transportation service resulting from the failure and/or inability to properly maintain plant and equipment, which produces an adverse effect on railroad operations to an extent that services to shippers have been rendered partially or wholly inadequate and/or has resulted in diminishing the railroads' competitive ability;

"For purposes of this order, delayed capital improvements represent actually planned, specifically identified capital improvements necessary for the provision of adequate or improved transportation service to shippers and which had not been undertaken, scheduled, or otherwise committed because funding or financing was not, or projected to be, available through June 30, 1975. They exclude improvements in progress and those scheduled or otherwise committed and recognized in capital budgets in effect or applicable on June 1, 1974. These capital improvements are further identified as delayed expenditures which would (1) add to or improve the carriers' plant and/or equipment so as to increase its usefulness, capacity, durability and efficiency, and (2) which are capitalizable in the property accounts in accordance with the Commission's accounting regulations; . . ."

but relaxed its order by changing the cut-off date for determining what constituted delayed capital improvements.

Rebuffed by the Commission, Chessie instituted this action on August 15, 1974, and in due course secured an interlocutory injunction restraining the Commission from controlling Chessie's expenditure of its increased revenues.[4] In the meantime, at the instance of other railroads, the Commission reopened the proceedings. After a hearing, in which Chessie declined to participate, the Commission on October 3 modified its orders of June 3, July 18, and August 9 by allowing a railroad to use the increased revenues for new capital improvements if it could show that it could not use the funds for deferred maintenance and delayed capital improvements, as defined by the Commission.[5] Chessie then amended its complaint, alleging that the restrictions on expenditure of revenue, even as modified by the October 3 order, exceeded the Commission's statutory authority.

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[4] No other railroad filed suit against the Commission.

[5] The October 3 relaxation of previous orders was stated as follows:

> "*It is further ordered,* That railroad respondents, if any, which are unable to use the full amount of the funds generated by the increase for deferred maintenance or delayed capital improvements, as defined in this proceeding, may expend such funds for new and additional capital improvements providing advance approval is obtained from the Commission, Division 2, as above set forth: . . ."

II

At the outset the Commission challenges the jurisdiction of the Court to review the questioned orders. It contends that administrative proceedings involving the suspension of rates are free from judicial review. Consideration of this defense requires examination of the suspension process.

Railroads have always had the right to initiate higher rates, and the Interstate Commerce Act of 1887 did not grant the Commission power to suspend the new charges. Shippers therefore sought injunctive relief while the Commission investigated the lawfulness of the increases. However, the expense of litigation and the courts' lack of uniformity prompted Congress in 1910 to authorize the Commission to suspend a new rate for no more than seven months while it conducted an investigation. The principal cases interpreting the 1910 amendment, codified as 49 U.S.C. § 15(7),[6] are United States v. SCRAP,

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[6] 49 U.S.C. § 15(7) provides in part:

> "Whenever there shall be filed with the Commission any schedule stating a new . . . rate, . . . the Commission shall have . . . authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier . . . , but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, . . . and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier . . . affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule

412 U.S. 669 (1973), and Arrow Transportation Co. v. Southern Railway Co., 372 U.S. 658 (1963). In *Arrow* the Court concluded that Congress intended "to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief." 372 U.S. at 667. It therefore held that a district Court could not restrain a railroad from charging the proposed rates after the seven-month administrative suspension period, even though the Commission had not completed its investigation. In *SCRAP* the Court held that the exclusive suspension power vested in the Commission by § 15(7) deprived a district court of jurisdiction to forbid the collection of a new rate which the Commission had not suspended.

Arrow and *SCRAP* establish beyond question our lack of jurisdiction to review the provisions of the

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and defer the use of such rate, . . . but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, . . . goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. . . . [T]he Commission may by order require the interested carrier . . . to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier . . . to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified."

June 3 order that suspended the proposed rates. Nor can we enjoin the Commission from permitting the railroads to refile and collect the increased rates. The Commission's discretion in these matters is unbridled, and its decision regarding suspension is unreviewable. *See generally* K. Davis, Administrative Law Treatise 966 (1970 Supp.).

However, lack of power to review certain parts of the Commission's orders does not deny jurisdiction to examine other parts. Congress gave the courts jurisdiction to review "in whole or in part" any order of the Commission. 28 U.S.C. § 1336(a). A condition is considered a separate part of an order for the purpose of exercising this jurisdiction. United States v. Chicago, M. St.P. & P. R.R. Co., 282 U.S. 311, 328 (1931). We turn, therefore, to the suspension power in § 15(7) to determine whether Congress intended to withdraw from the judiciary claims that the Commission has unlawfully conditioned the suspension of rates on compliance with a requirement which it would otherwise have no statutory authority to impose. Section 15(7) mentions only one condition as concomitant to the Commission's power to suspend. The Commission can require the carrier to keep account of the amounts received from an increased rate and to refund any portion that ultimately is found to be unjustified.[7] A suspension order imposing this statutory condition is not subject to judicial review. Port of New York Authority v.

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[7] See footnote 6, *supra*.

United States, 451 F.2d 783, 786 (2d Cir. 1971) (by implication).

The statute's silence about other conditions should not be interpreted as a denial of the Commission's authority to appropriately restrict the exercise of its suspension power in a variety of ways. But when the Commission has selected a condition that is not expressly authorized by § 15(7), the courts have jurisdiction to determine whether it should be set aside because it exceeds the Commission's regulatory powers. Judicial relief is available to curb administrative acts that exceed an agency's statutory authority. In Harmon v. Brucker, 355 U.S. 579, 581 (1958), the Court rejected the defense that certain administrative action was unreviewable, saying:

> "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers. . . . The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the [official] did exceed his powers. If he did so, his actions would not constitute exercises of his administrative discretion, and, in such circumstances as those before us, judicial relief from this illegality would be available."

As Leedom v. Kyne, 358 U.S. 184, 188 (1958), explains, in such instances a court does not simply review the agency's action in the same sense that it would review an order falling within the agency's

statutory authority. Instead, the court must measure the order by the statute and if it exceeds the agency's delegated power, the Court must annul it.

We conclude, therefore, that the general rule against judicial review of the Commission's exercise of its suspension power does not deprive the court of jurisdiction. It may hear and determine Chessie's claim that the provisions of the suspension orders that dictate the manner in which the additional revenues shall be used exceed the Commission's statutory powers.

But those provisions of the Commission's orders directing the railroads to supply information about the condition of their facilities, the amount of revenue generated by the rate increase, and the purposes for which it has been or will be expended stand on a different footing. Section 15(7) provides that the Commission "may from time to time suspend" the increased rates. Obviously, the Commission needs, and may demand, accurate, complete information from the carriers so that it can responsibly exercise its power to suspend. Therefore, because the reporting requirements are incidental to the Commission's exclusive power to suspend, they are not reviewable.

III

The Commission next asserts that Chessie is barred from seeking judicial relief because it failed to exhaust its administrative remedies. It bases this defense on the premise that Chessie should have par-

ticipated in the reopened proceedings culminating in the October 3 order, that it should have applied for an exception as allowed by this order, or that it should have sought reconsideration of the order. Chessie responds that when it became apparent that the July 18 order would not permit it to utilize the rate increases allowed by the June 3 order, it promptly moved for exemption. It emphasizes that it filed this suit only after the Commission denied its petition. Chessie explains that it did not join the subsequent petition for reconsideration filed by other railroads and declined to participate in the Commission's rehearing because it feared placing its judicial standing in jeopardy.

We agree with the Commission that Chessie's institution of this action in August did not preclude the Commission from subsequently reopening the hearing at the request of other railroads. The statute authorizing the Commission to reopen its proceedings and to modify its orders does not prevent the Commission from acting, while a petition for review is pending, as long as its subsequent proceedings do not interfere with the suit. 49 U.S.C. § 17(6) and (7). American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 540-42 (1970). Though the Commission conducted its rehearing and entered its October 3 order after this suit was filed, there was no interference. We heard the case after October 3 and consequently have been able to give full consideration to the Commission's post-suit proceedings. In multi-party administrative proceedings, some parties may

seek reconsideration of the agency's final action, while others may seek judicial relief. Both tribunals may then exercise jurisdiction when, as here, they do not work at cross-purposes. Wrather-Alvarez Broadcasting, Inc. v. F.C.C., 248 F.2d 646, 648 (D.C. Cir. 1957).

Contrary to the Commission's position, we conclude that Chessie has exhausted its administrative remedies. Because the Commission's October 3 order reaffirmed its authority over the carriers' expenditure of funds, Chessie could not have gained full relief, even if it were granted an exception on the Commission's terms. Moreover, Chessie did not have to reiterate its claim that the conditions were illegal by moving for reconsideration of the October 3 order. In Skinner & Eddy Corporation v. United States, 249 U.S. 557 (1919), a shipper sued to annul an order on the ground that the Commission had exceeded its statutory authority. In rejecting the contention that the shipper had not exhausted his administrative remedies, the Court said:

> "The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission." 249 U.S. at 562.

The Commission relies on Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938), which holds that a district court cannot enjoin a National Labor

Relations Board hearing on the ground that the employer's business is not related to interstate commerce. Since Congress delegated the initial resolution of this factual issue exclusively to the Board, the Court ruled that the employer must exhaust his administrative remedies before challenging the Board's jurisdiction. *Skinner* and *Myers* were written by Mr. Justice Brandeis, and they are not contradictory. In *Skinner* the complaint attacked the statutory authority of the agency to act; in *Myers* it attacked the factual predicate to establish the agency's jurisdiction. Here, Chessie challenges the Commission's statutory authority to supervise the expenditure of its revenue. Consequently, Chessie is not barred from seeking judicial relief, even though it did not pursue administrative relief from the October 3 order.

IV

As its third affirmative defense, the Commission alleges that Chessie is estopped from challenging the legality of the conditions in the June 3 order because it filed for the new rates allowed by this order and has benefited from them. The Commission points out that the joint petition for a rate increase filed by the nation's railroads emphasized the need for funds to maintain and improve tracks and equipment, and that the June 3 order was entered to enable the carriers to meet this exigency. Chessie asserts that it had anticipated its maintenance requirements by embarking on a $300 million capital improvement

program in December 1973, six months before the Commission acted.

We have no doubt that Chessie's facilities require additional maintenance and improvement. For example, in 1973 it had 240 derailments because of defects and failures in its roadway as compared with 87 in 1964, an increase of 176 percent. Chessie's unrefuted need to maintain and improve its property was a factor causing it to join other railroads in seeking a rate increase, but proof of this does not establish that Chessie is estopped from questioning the legality of the Commission's conditions.

When Chessie refiled for the rate increase under the June 3 order, it was not clear that its current improvement program failed to comply with the Commission's order. Only after the Commission clarified its intent and defined its terms in the July 18 order did Chessie's officials become concerned that their program did not meet the Commission's specifications. Chessie did not acquiesce; instead, it immediately challenged the legality of the newly defined conditions. Thus, no action on its part lulled the Commission into withholding its power to suspend. At no time did Chessie represent to the Commission that it would use the new rate increase exclusively for deferred maintenance or delayed capital improvement as defined by the Commission. Nor did it pretend that it would submit to acts it believed to be in excess of the Commission's powers. It is the absence of this dissemblance and the Commission's lack of reliance on any statement or act of Chessie's

that distinguishes this case from F.P.C. v. Colorado Interstate Gas Co., 348 U.S. 492 (1955), and Admiral-Merchants Motor Freight, Inc. v. United States, 321 F.Supp. 353 (D. Colo. 1971), on which the Commission relies. Estoppel is an equitable doctrine, and it should not be lightly imposed to deprive a person of the right to challenge the legality of government action. We therefore hold that Chessie is not estopped from suing to enjoin the Commission.

V

It is the Commission's position on the merits that since it could have unconditionally suspended the rate increase, it has the inherent authority to allow an increase subject to reasonable conditions consistent with the purposes of the Act. For its part, Chessie contends that Commission control over a railroad's revenues is not consistent with the Act.

The starting point for the consideration of these contentions is the undeniable proposition that the Commission can impose conditions that have been expressly or impliedly authorized by law. *See, e.g.*, United States v. SCRAP, 412 U.S. 669, 675 (1973); Port of New York Authority v. United States, 451 F.2d 783, 785-787 (2d Cir. 1971); Algoma Coal & Coke Co. v. United States, 11 F.Supp. 487, 49-394 (E.D. Va. 1935); *cf.* Southern Pacific Co. v. Olympian Dredging Co., 260 U.S. 205 (1922); D.C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission, 466 F.2d 394 (D.C. Cir.

1972). None of these cases suggest, however, that the Commission's authority to suspend rates enables it to exercise powers which Congress never expressly or impliedly conferred on it. Indeed, it is axiomatic that an administrative agency, a creature of the legislature, cannot exceed its statutory authority. Stark v. Wickard, 321 U.S. 288, 309 (1944). Closer to the point, an agency cannot condition the lawful exercise of its authority on compliance with an illegal proviso. Standard Airlines v. C.A.B., 177 F.2d 18, 20 (D.C. Cir. 1949). We turn, therefore, to the critical question of the case: Has Congress expressly or impliedly authorized the Commission to direct railroads how they shall spend the revenue derived from a rate increase that is subject to the Commission's suspension power?

The Act does not expressly authorize the Commission to condition withholding suspension of a rate increase on how the additional income is spent. As we previously noted, the provision of the Act granting suspension power, § 15(7),* explicitly empowers the Commission to condition the interim allowance of rates on refunds, should the new tariff subsequently be found unlawful. It is silent about other conditions. Therefore, lacking express authority, the Commission relies on implied authority.

Initially, the Act did not authorize the Commission to fix rates. Congress did not confer this power until it passed the Hepburn Act in 1906, which dealt

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* See note 6 and text at note 7, *supra*.

only with maximum charges. The Transportation Act of 1920 granted authority to fix minimum as well as maximum rates.[9] It is a provision of the 1920 Act, now codified as 49 U.S.C. § 15a(2),[10] which the Commission cites as implied authority for its orders. Section 15a(2) prescribes certain factors which the Commission must take into consideration "[i]n the exercise of its power to prescribe just and reasonable rates." Never before has the Commission claimed that this section expands its rate-making power to embrace control over the expenditure of a carrier's revenue. Instead, its decisions have been to the contrary. Shortly after the passage of the Transportation Act of 1920, the Commission held in Missouri-

[9] The Transportation Act of 1920, 41 Stat. 456, included a recapture clause which provided that one half of any income in excess of 6 percent of the value of the carrier's property was to be paid to the Commission for a general contingency fund. The railroads were required to keep a portion of the remainder in a reserve fund. Pub. L. 66-152 §§ 15a(6-8), 41 Stat. 456, 489 (1920). The clause was repealed in 1933, ending the only peacetime control over the railroads' expenditures. Pub. L. 73-68 § 206(a), 48 Stat. 195, 220 (1933).

[10] 49 U.S.C. § 15a(2) provides:

> "(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

Kansas-Texas R.R. Co. v. Kansas City Terminal Ry. Co., 104 I.C.C. 203 (1925), that § 15a did not authorize it to restrain a carrier from expending its revenue on an improvident contract. Construing § 15a, it said:

> "What the provision requires or authorizes us to do is to fix remunerative reasonable rates in circumstances which embrace honest, efficient, and economical management as a condition or limitation. We should have the information in that respect which will aid an effective exercise of our duty and authority, but we are not commanded to insure or empowered to enforce such management, responsibility for which at all times rests upon the carriers." 104 I.C.C. at 224.

The Commission's views about the limitation of its authority remained unchanged until the present controversy. As recently as 1971, the Commission ruled that the development of capital for improving deteriorated railroad facilities is a function of management, "not a measure of the reasonableness of rate levels." Increased Freight Rates 1970 and 1971, 339 I.C.C. 125, 180 (1971).

Since the Commission has not previously conditioned withholding the suspension of rates on control of a railroad's expenditures, no court has considered the precise issue presented by this case. However, in other contexts, courts have uniformly held that the Commission lacks statutory authority to order railroads how to spend their funds. In Missouri Pa-

cific R.R. Co. v. Norwood, 42 F.2d 765 (W.D. Ark. 1930), *aff'd* 283 U.S. 249 (1931), the railroad claimed that it need not comply with a state full-crew law because Congress exclusively occupied this field by the Transportation Act of 1920. This Act, the railroad contended, authorized the Commission to prohibit the wasteful expenditure of a carrier's funds. Rejecting this claim, the district court said:

> "The logical result of this contention, as to grant of power to the Commission, is that Congress conferred the power to supervise carrier expenditures—at least, to the extent of preventing waste or improvidence. The power to do this *directly* would be a decided step in advance of any congressional action before the Transportation Act. This subdivision of this section deals with just one main subject. That subject is the rate of return on property value to be determined and allowed the carriers by the commission. As an element in such determination, the transportation needs of the country are to be considered by the commission. . . . Such provision gives no power of directly supervising carrier expenditures. It provides control *only* through the rate of return allowed by the commission. . . . There is no suggestion in the section as enacted, in the committee reports or in the congressional debates of any direct control by the commission of any expenditures of the carriers . . ." 42 F.2d at 773.

The Supreme Court has held that the Commission does not have the implied power to order railroads

to construct a union station. Writing for the Court in I.C.C. v. United States ex rel. Los Angeles, 280 U.S. 52, 70 (1929), Mr. Chief Justice Taft said:

> "If Congress had intended to give an executive tribunal unfettered capacity for requisitioning investment of capital of the carriers and the purchase of large quantities of land and material in an adverse proceeding, we may well be confident that Congress would have made its meaning far clearer and more direct than in the present meager provisions of the transportation act."

Earlier the Court had ruled that the Interstate Commerce Act did not impliedly authorize the Commission to order a railroad to furnish tank cars for shipping oil. United States v. Pennsylvania R.R. Co., 242 U.S. 208 (1916). Although this case was decided before the enactment of § 15a, the Commission recognizes it as a current precedent. In 1972 the Commission acknowledged that it "has no authority to require a railroad to equip itself with specified types of cars." I.C.C. 86th Annual Report to Congress 23 (1972).

As the Commission points out, none of these cases dealt with the suspension of rates. However, they unmistakenly establish that the Commission has no general power to control a railroad's expenditures. No provision of § 15(7), authorizing suspension of rate increases, implies that the Commission may exercise, as an incident to suspension, the control over expenditures that Congress has otherwise withheld

from it. Lacking statutory authority to exercise this control directly, the Commission cannot accomplish the same result indirectly. T.I.M.E. v. United States, 359 U.S. 464, 475 (1959). Nevertheless, one cannot read the administrative record without recognizing that the Commission's orders are a well-intentioned effort to cope with the vexatious deterioration of track and equipment that saps the ability of the nation's railroads to serve the public adequately. We do not judge the wisdom of the Commission's remedy; rather, our sole function is to determine its lawfulness. We conclude that Congress has not authorized the Commission to control a carrier's expenditure of funds as a condition to withholding the suspension of rates. But we do not determine whether the rates should or should not be suspended without the conditions, for that decision rests with the Commission. United States v. SCRAP, 412 U.S. 669 (1973).

Accordingly, we will permanently enjoin the Commission from restricting Chessie's expenditure of revenues, as it has done in its orders of June 3, July 18, August 9, and October 3, 1974, in Ex Parte No. 305. We will not enjoin the Commission from requiring Chessie to report in accordance with its orders. In view of our disposition of the case, it is unnecessary for us to decide the procedural issues Chessie raises.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 74-0370

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, and WESTERN MARYLAND RAILWAY COMPANY, PLAINTIFFS

—*v*—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

For reasons stated in the opinion of the court, it is ADJUDGED, ORDERED and DECREED:

1. The Commission, its officers, employees, and successors are enjoined from enforcing against the Chesapeake and Ohio Railway Company, the Baltimore and Ohio Railroad Company, and the Western Maryland Railway Company the following provisions of its order of June 3, 1974, as clarified and amended by its orders of July 18 and August 9, and its order of October 3, 1974, in Ex Parte No. 305:

> Revenues generated by the increases should be expended for capital improvements and deferred maintenance of plant and equipment and the

amount needed for increased material and supply cost, other than fuel. (Order, June 3, at 3.)

* * * *

[R]ailroad respondents, if any, which are unable to use the full amount of the funds generated by the increase for deferred maintenance or delayed capital improvements, as defined in this proceeding, may expend such funds for new and additional capital improvements providing advance approval is obtained from the Commission, Division 2, as above set forth. (Order, October 3, at 5.)

2. The petition for an injunction to restrain the Commission from requiring the reports prescribed by those orders is denied.

3. This case is remanded to the Commission for further proceedings that are consistent with the opinion of the court.

/s/ John D. Butzner, Jr.
United States Circuit Judge

/s/ Robert R. Merhige, Jr.
United States District Judge

/s/ D. Dortch Warriner
United States District Judge

April 22, 1975

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 74-0370-R

[Filed Jun. 20, 1975, Clerk, U. S. Dist. Court, Richmond, Va.]

THE CHESAPEAKE AND OHIO RY. COMPANY, THE BALTIMORE AND OHIO RR. COMPANY, and WESTERN MARYLAND RY. COMPANY, PLAINTIFFS

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the United States of America and the Interstate Commerce Commission, defendants herein, hereby appeal to the Supreme Court of the United States from the Opinion and Final Judgment of this Court filed April 22, 1975.

This appeal is taken pursuant to 28 U.S.C. § 1253.

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CERTIFICATE OF SERVICE

I certify that on this, the 20th day of June, I served copies of the foregoing Notice of Appeal on the following, by first-class mail, postage prepaid:

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/s/ Charles L. Beard
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Assistant U. S. Attorney

APPENDIX D

SERVICE DATE
April 30, '74

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 29th day of April, 1974.

EX PARTE NO. 305

NATIONWIDE INCREASE OF TEN PERCENT IN FREIGHT RATES AND CHARGES, 1974
(Short Notice)

It appearing, That on April 22, 1974, most of the nation's railroads * and certain water and motor carriers having joint rates with those railroads, filed a petition, accompanied by supporting verified statements, requesting the Commission to institute an investigation into the revenue needs of all carriers by railroad operating in the United States, and to make all such carriers respondent hereto, to authorize the filing of a master tariff and connecting link supplements and other necessary tariffs and supplements, fourth-section relief, and modification of all outstanding orders to the extent necessary, increasing present rates and charges within, from, to, and via all territories by 10 percent (subject to unidentified exceptions which may be warranted), to become effective

* The Long Island Rail Road did not join in the petition.

on May 2, 1974, or as soon thereafter as possible, upon not less than 10 days' notice, subject to a refund rule;

It further appearing, That in view of the extraordinary request to make the proposed increase effective on May 2, 1974, or as soon thereafter as possible, upon not less than 10 days' notice, it is necessary to consider that exceptional request separately at this time;

It further appearing, That the proposed 10 percent increase would produce additional revenues of $1.5 billion for all railroads, $505 million in the Eastern District, $272 million in the Southern District, and $723 million in the Western District (excluding the one percent sought by the eastern and western railroads in excess of that authorized on an interim basis and presently pending in Ex Parte No. 303);

It further appearing, That the railroads' rate of return on net investment was 3.08 percent nationally, 0.56 percent in the Eastern District, 5.40 percent in the Southern District, and 4.21 percent in the Western District; and that at the proposed rates and present cost levels the respective estimated rates of return would be 5.27, 2.99, 7.48, and 6.26 percent;

It further appearing, That letters supporting the railroads' request to be authorized to make the proposed increase effective on 10 days' notice have been received from the Secretary of Transportation, the United Transportation Union, and the Brotherhood of Railway, Airline and Steamship Clerks, Freight

Handlers, Express and Station Employees; and that an objection to such request has been received from the National Industrial Traffic League;

It further appearing, That the petition discloses that the railroads reached agreement on the proposal on April 3; that, however, it was not filed with the Commission until April 22, with the request that the increases be permitted to become effective on May 2 on 10 days' notice which would have required action on the petition on the day of filing; that the evidence submitted with the petition consists of 9 voluminous exhibits and 50 verified statements supporting a proposed increase totalling approximately $1.5 billion; and that it was obviously impossible to adequately consider and verify the evidence in the general public interest in less than one day;

It further appearing, That with respect to the request to make the increase effective on May 2, the petitioners claim that through publicity and the *mailing* of copies of the petition and supporting evidence on April 22, the date of filing with the Commission, to the parties in the last general rate increase proceeding, sufficient opportunity has been afforded the shipping public to present its views before May 2; but that, to the contrary, allowing for time in the mails for actual delivery of the petitioners' request and any shipper responses, the remainder of time available for shipper consideration of the proposal would have been wholly inadequate;

It further appearing, That concerning the alternative request to make the increase effective on 10

days' notice as soon as possible after May 2, except for the Penn Central Transportation Company, (George P. Baker, Richard C. Bond, and Robert W. Blanchette, Trustees) and the Lehigh Valley Railroad Company, the emphasis of the arguments in the proposal is on the need for funds for maintenance and capital improvements; and that it is not established that irreparable harm would follow the delay necessary to permit shippers and other interested persons a fair opportunity to present their views;

It further appearing, That, the Penn Central and the Lehigh Valley urge that unless their cash flow is improved their continued operations are in peril; but that, based on monthly, weekly, and daily reports of cash positions of those carriers furnished to the Commission on a continuing basis, it does not appear that their continued operations are threatened in the time necessary to provide for public responses; and that, furthermore, under the Rail Reorganization Act of 1973, funds have been designated for interim relief to railroads in reorganization, therefore,

It is ordered, That the petition to the extent that it requests authority to publish increases on short notice, that is to make the proposed increases effective on 10 days' notice be, and it is hereby, denied. As soon as possible, the Commission shall specify the procedures to be followed with respect to this petition in a subsequent order. In an effort to maintain orderly procedure and to avoid the filing of duplicative representations, interested parties are requested not to file any pleadings either supporting

or objecting to the substance of the petition until the subsequent order has been served.

It is further ordered, That notice of this order be given by serving a copy thereof on each party to the proceeding in Ex Parte No. 303, to the Governor and public utility regulatory body of each State, the Environmental Protection Agency, the Special Assistant to the President for Consumer Affairs, and by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing a copy with the Director, Office of the Federal Register for publication therein.

By the Commission.

ROBERT L. OSWALD
Secretary

[SEAL]

APPENDIX E

May 3, '74

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 3rd day of May, 1974.

EX PARTE NO. 305

NATIONWIDE INCREASE OF TEN PERCENT IN FREIGHT RATES AND CHARGES, 1974

(Authority to File)

It appearing, That, as set forth in some detail in the order herein denying the request for short notice, entered on April 29, 1974, most of the nation's railroads * and certain connecting water and motor carriers seek authority to publish a nationwide general increase of 10 percent in freight rates and charges, subject to unidentified exceptions, and subject to a refund rule;

It further appearing, That in the report in Ex Parte No. 295, *Increased Freight Rates and Charges, 1973, Nationwide*, 344 I.C.C. 589, it was required that in future proposals for general increases by the railroads a showing should be made regarding (1) efforts to update tariffs and (2) efforts to improve service, that while no reference is made to (1) in the petition and accompanying statements, the

* The Long Island Rail Road did not join in the petition.

carriers have been complying with the requirement in the report in Ex Parte No. 295 by filing periodic reports of the progress in tariff updating, and that a showing has been made with respect to the other matter.

It further appearing, That the data accompanying petition shows that the proposed increase would produce additional revenues of $1.5 billion ($505 million in the East, $272 million in the South, and $723 million in the West); and that it would improve the railroads' rate of return from 3.08 to 5.27 percent nationally (from 0.56 to 2.99 in the East, from 5.40 to 7.48 in the South, and from 4.21 to 6.26 in the West);

It further appearing, That, referring to the Commission's reference, in the report in Ex Parte Nos. 265 and 267, *Increased Freight Rates 1970 and 1971*, 339 I.C.C. 125, 181-182, to a rate of return of 6 percent on net investment and the statement that such a return represents what "the respondents must make every effort to attain if they are to be in a position to provide the improved services which will be needed in the future," the petitioners urge that the proposed 10 percent increases, resulting in a national rate of return of 5.27 percent, would be consistent with that position;

It further appearing, That the petitioners contend that they are in urgent need of additional revenue for necessary maintenance and capital investment to prevent deterioration of the properties used to perform the service and to expand service to meet the

demand; that since the filing of the proposed increase in pending Ex Parte No. 303, Increased Freight Rates and Charges, 1974, Nationwide, the price of materials alone has increased by $475 million and other operating expenses by $175 million, and that taxes will increase by $282 million; and that the remaining $568 million to be realized from the proposed increase presumably would be used to improve "the ability of the railroad system to meet the transportation requirement of the county;"

It further appearing, That in consideration of the evidence submitted to show that additional revenue is required to offset inflated prices of materials, to improve maintenance, and to increase net railway operating income to a level indicated by the Commission to be required in the report in Ex Parte Nos. 265 and 267, and especially in view of the need of certain railroads to improve their cash flow within the reasonably near future to continue operations, the railroads should be authorized to file the proposed increase to become effective on not less than 30 days' notice, subject to protests and suspension;

It further appearing, That as previously indicated, the carriers seek a 10 percent increase in their rates and charges, subject, however, to certain exceptions which they have not identified; that since the filing of the petition, official notice is taken of a news item suggesting that some carriers, in certain instances, do not intend to increase their rates and charges on certain commodities at all, and, some carriers, in other instances, intend to apply an increase of less

than 10 percent to certain commodities; and, that in order for the general public to have an overall view of the proposal, the carriers should, upon the filing of the tariffs or schedules implementing the authority herein granted, set forth a complete list of exceptions, if any, to the general proposal, including holddowns, flagouts, and provisions for no increases, and, the special permission order so provides; therefore,

It is ordered, That a proceeding be, and it is hereby, instituted into the revenue needs of the railroads of the United States, and that all common carriers by railroad subject to the Interstate Commerce Act be, and they are hereby, made respondents hereto.

It is further ordered, That in publishing the proposed increase in accordance with the special permission authority hereinafter granted, subject to protest and suspension, the schedules shall be published to become effective on June 5, 1974, upon not less than 30 days' notice, and shall include the refund provision prescribed in said permission.

It is further ordered, That protests and verified statements in opposition shall be filed to reach the Commission on or before May 24, 1974 (12 days prior to the published effective date of the proposed schedules), and replies thereto will be due 5 days thereafter, or on May 29, 1974; that the verified statements will be considered as protests and will be made a part of the formal record, along with those filed by the respondents in support of the proposal. All protests, by wire and otherwise, received previ-

ously will be considered as such. For the Commission's use, the original and 24 copies of all documents to be filed in accordance with this order should be sent to the Secretary, Interstate Commerce Commission, Washington, D.C., 20423, Room 5342, but a lesser number of copies may be filed upon a showing of good cause. One copy of each document shall be served (except that where parties are able to do so, 25 copies should be served) upon the representative of the petitioning railroads, Mr. Thormund A. Miller, American Railroads Building, Room 527, 1920 L Street, N.W., Washington, D.C. 20036.

It is further ordered, That any person or persons believing that the tariff proposal filed hereunder will have a significant effect upon the quality of the human environment are hereby invited to comment upon this matter in any statements that may be filed.

It is further ordered, That the request for fourth-section relief will be considered following the filing of protests and statements in opposition and of replies thereto.

And it is further ordered, That in all other respects the petition be, and it is hereby, denied.

SPECIAL PERMISSION NO. 74-3440

It is ordered, for good cause shown:

1. All petitioning railroads, and water and motor carriers to the extent they have joint rates with said railroads, and their tariff-publishing agents, be, and they are hereby, authorized to depart from the Commission's tariff-publishing rules to publish and file tariffs, to become effective on June 5, 1974, upon not

less than 30 days' notice to the Commission and to the public, providing for increased rates and charges as set forth in the petition.

(a) By publication and filing of a master tariff of increased rates and charges, and supplements thereto, providing increases by means of conversion tables of rates and charges, which shall include, and maintain in effect, a refund provision reading as follows:

> In the event any increases resulting from the application of this tariff exceed the increases subsequently approved or prescribed by the Interstate Commerce Commission, the carriers will refund the difference between the increases resulting from the application thereof and any increases which may subsequently be approved or prescribed by the Interstate Commerce Commission with 4 percent interest.
>
> In the event an increase resulting from the application of this tariff is disapproved by the Commission and no increase is authorized, the carriers will refund the full amount of the increases collected with 4 percent interest.

The master tariff shall bear an expiration date not beyond one year after the effective date, which may not be canceled or extended except upon specific authorization of this Commission, and all relief herein expires with that date. The master tariff must initially contain all provisions for application of the

increases (including provisions for no increases, if any) following which (unless suspended) any provisions other than those of a general character may be canceled and transferred to the particular tariffs affected upon a common effective date with appropriate notation to that effect in the master tariff amendment.

The master tariff shall contain provisions stating that the fuel surcharge increases authorized by the Commission, as set forth in a separate table in the master tariff, shall be applied to subjected rates and charges prior to the application of the increases authorized to be filed in Ex Parte No. 305.

(b) By publication and filing of a connecting link supplement to each tariff (to be made subject to the master tariff), connecting such tariffs with the master. Such supplements may be blanket supplements (a common supplement issued to two or more tariffs), provided each copy officially filed is hand marked in the appropriate places as to the supplement number and the I.C.C. number of the tariff it supplements.

(c) By publication and filing of tariffs or amendments to tariffs effective concurrently with the master tariffs and upon the same notice which provide specifically increased rates and charges but which do not result in an increase in charges for transportation and other services greater than those specified in the petition, provided all such publications are identified in the tariffs and made subject to the refund clause worded substantially as in paragraph 1(a) herein.

(d) By publication of provisions in tariffs or amendments thereto subjecting rates and charges therein to the provisions of the master tariff.

(e) By publication and filing of a supplement to Tariff of Surcharges Account Increases in Fuel Costs X-301-C, Traffic Executive Association-Eastern Railroads, I.C.C. No. C-1027, and other agents, providing for the cancellation thereof concurrent with the effective date of the master tariff authorized in paragraph 1(a) herein.

2. (a) The master tariff and supplements thereto, and all other tariffs and amendments to tariffs, that employ the short-form methods authorized herein shall bear the notation:

Form of publication authorized
I.C.C. permission No. 74-3440

(b) Tariffs or amendments to tariffs publishing specifically increased rates or charges hereunder shall bear the notation:

Publication made in accordance
with I.C.C. permission No.
74-3440.

3. Connecting-link supplements authorized herein shall be exempt from the Commission's tariff-publishing rules governing the number of supplements and the volume of supplemental matter permissible.

4. Outstanding orders of the Commission are hereby modified only to the extent necessary to permit the filing of tariff publications containing the proposed increases, and all tariff publications filed are subject to protest and possible suspension or rejection. In that regard, we direct petitioners' attention to our admonitions in prior general increase proceedings concerning maintenance and preservation of existing port relationships. See for example *Increased Freight Rates and Charges, 1972*, 341, I.C.C. 288, 336, and *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, 188. Rate increase tables on grain shall progress in one-half cent increments.

It is further ordered, That notice of this order be given by serving a copy thereof on each party to the proceeding in Ex Parte No. 303, to the Governor and public utility regulatory body of each State, the Environmental Protection Agency, the Special Assistant to the President for Consumer Affairs, and by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing a copy with the Director, Office of the Federal Register for publication therein.

By the Commission.

ROBERT L. OSWALD
Secretary

[SEAL]

APPENDIX F

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 3rd day of June, 1974.

EX PARTE NO. 305

NATIONWIDE INCREASE OF TEN PERCENT IN FREIGHT RATES AND CHARGES, 1974

It appearing, That on May 6, 1974, most of the nation's railroads [1], and certain connecting water and motor carriers having joint rates with said railroads, filed schedules of a nationwide general increase of 10 percent in freight rates and charges [2] under authority of Section 6 of the Interstate Commerce Act and the Commission's Special Permission Order No. 74-3440, of May 3, 1974, said tariff schedules having been filed subject to possible investigation and suspension and bearing an effective date of June 5, 1974;

It further appearing, That by petition and verified statements dated April 22, 1974, as supplemented May 7, 1974, the carriers requested the issuance of orders granting relief from outstanding orders entered by the Commission, relief from Section 4 of the Act, and all other relief necessary to permit the proposed general increase to become effective, subject to the condition that refund be made in the event that any increase (including interim increases) resulting

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[1] Only the Long Island Rail Road did not join in the petition.

[2] Certain exceptions were made to the increase.

from the application of the tariff exceeded the increases subsequently approved or prescribed by the Commission;

It further appearing, That interested parties were permitted to file protests and requests for suspension of the tariff schedules and verified statements in opposition on or before May 24, 1974, and the railroads were permitted to file replies on or before May 29, 1974;

It further appearing, That the Commission having considered the evidence and arguments of the parties as set forth in the protests, verified statements and replies recognizes that the nation's railroads are in need of additional freight revenues to offset recently incurred costs of materials, other than fuel, and to provide an improved level of earnings; that the Commission also recognizes that without the additional revenues to be derived from increased freight rates and charges, the earnings of the nation's railroads would be insufficient to enable them under honest, economical and efficient management to provide adequate and efficient railroad transportation services consistent with the public interest and the national transportation policy;

It further appearing, That the Commission, having reviewed the evidence and arguments of the parties, is convinced that the service provided by the nation's railroads is less than adequate and is in danger of further deterioration detrimental to the public interest, that in order to improve service the railroads must generate additional revenues, and that the in-

creases proposed would, if permitted to become effective, generate additional revenues sufficient to enable the carriers to prevent further deterioration and improve service. However, if the schedules were permitted to become effective as filed and without conditions designed to promote service improvements, the increases proposed would be unjust and unreasonable and contrary to the dictates of the national transportation policy;

And it further appearing, That, insofar as increases are hereinafter authorized, said increases will not have a significant adverse effect upon the quality of the human environment within the meaning of the National Environmental Policy Act of 1969; therefore;

It is ordered, That the operation of the schedules specified below be, and it is hereby, suspended and that the use thereof in interstate and foreign commerce be deferred to and including January 4, 1975, unless otherwise ordered by this Commission;

TARIFF OF INCREASED RATES AND CHARGES X-305, issued jointly by the Western Trunk Line Committee, Agent, its ICC No. A-4931, and other designated agents:

In Tariff X-305:

On Pages 66 to 73,
TABLE 5;
On pages 74 to 81,
TABLE 10;
On pages 82 to 85,
TABLE 10-G;

In Tariff X-305 and Supplement 1:

All reference to TABLES 5, 10 and 10-G wherever such reference appears therein;

It is further ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of all the rates, charges, and regulations which were contained in the suspended schedules, as aforesaid, with a view to making such findings and orders in the premises as the facts and circumstances shall warrant, all the said schedules to be subject to a refund provision as contained in the suspended tariff;

It is further ordered, That the carriers which are parties to this proceeding be, and they are hereby, authorized to cancel the suspended tariff on one day's notice;

It is further ordered, That in the event that the carriers which are parties to this proceeding elect to cancel the suspended tariff, then the carriers which are parties to this proceeding be, and they are hereby authorized to establish upon not less than 15 days' notice to the Commission and the public by filing and posting in the manner prescribed in the Interstate Commerce Act, an increase in rates and charges not to exceed those set forth in the cancelled tariff (to be designated X-305A) except that, in view of the pendency of Ex Parte No. 295 (Sub-No. 1), Increased Freight Rates and Charges, 1973—Recyclable Materials, the said increase is not authorized on the commodities described in paragraph (m) of the general exceptions to tariff No. X-295-A; and

subject to maximum no higher than specified in the suspended tariff of increased rates and charges, X-305, effective June 5, 1974, or in connecting link supplements proposed to be made subject to said tariff, X-305, and in no event to produce greater revenue in connection with any rate or charge on any particular commodity or service than proposed in X-305; the master tariff authorized herein shall republish those provisions not suspended by this order, including tables 3 and 3-G and related provisions, provided that the tables are updated to include surcharge increase that became applicable June 1, 1974, and shall provide for cancellation of Tariff of Increased Rates and Charges X-305, Western Trunk Line Committee, Agent, ICC A-4931, and other designated agents; and subject to the following conditions:

1. On or before August 19, 1974, each carrier shall provide this Commission (a) with an estimate of the costs of deferred plant and equipment maintenance [3] as of June 30, 1974; number and percent of bad order cars by type; and miles of track by class on which slow orders were in effect. The estimate of deferred maintenance should be classified to show amounts for equipment by type of cars, locomotives plant, including yard and running track, and other similar classes of property and facilities;

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[3] The railroad management decision or determination to expend these revenues largely on long deferred maintenance or other capital improvements has been made. See the verified statements of the Chief Executive Officers or Operating Officers of the 17 representative railroads, which statements are a matter of record herein.

(b) with a report of the annual maintenance and capital expenditures for the years 1971-1973, inclusive, and the 1st and 2nd quarters of 1974. A report of estimated maintenance and capital investments shall be provided for the 3rd and 4th quarters of 1974 and the first two quarters of 1975.

2. All railroads shall maintain a monthly record of the increased freight revenues derived from the increases by months. The increased freight revenues may be estimated if the procedure for the estimations is explained.

3. Revenues generated by the increases should be expended for capital improvements and deferred maintenance of plant and equipment and the amount needed for increased material and supply cost, other than fuel. A record of such expenditures shall be maintained on a monthly basis.

4. At the end of the 3rd, 6th, and 9th months following the effective date of the increases, each carrier shall provide this Commission with an estimate of the freight revenues generated by the increases. Additionally, each carrier shall report the amount of expenditures made for deferred maintenance of plant and equipment, e.g., by type of car, track, cross ties, etc., as well as amounts expended for capital improvements by type of project. Furthermore, each carrier shall report the amount of unexpended funds derived from the authorized increases and how those funds are to be expended.

5. The schedules containing the increases authorized herein shall expire with June 30, 1975, unless otherwise ordered by this Commission. The Commis-

sion in authorizing increased rates and charges on interstate traffic herein is mindful and deeply concerned with the inadequacy of the services provided shippers by the respondent railroads. The Commission is cognizant that during the time rail service deteriorated, rail rates have had to be increased as a result of inflation to cover increased wage, fuel material, and interest costs as well as rising payroll taxes.

The Commission has been and continues to be concerned with the low level of earnings by the railroad industry which has contributed to the deferral of maintenance of plant and equipment, the postponement of capital improvements, and the depletion of the industry's net working capital. These factors in combination have caused a serious deterioration of rail service and increased expenses due to slow orders, car shortages, derailments, and shortages of locomotives.

The Commission has previously expressed its dissatisfaction with the evidence introduced by the respondents in general revenue proceedings. In the subject proceeding, the evidence introduced by the railroads is far from satisfactory, especially, for example, the respondents' failure to identify and quantify the costs of deferred maintenance.

Our responsibilities under the Act, *inter alia*, section 15a(2), require that we give consideration to "the need, in the public interest, of adequate and efficient railway transportation *service* at the lowest cost consistent with the furnishing of such *service*; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management

to provide such *service*." (Emphasis supplied) Accordingly, as previously indicated, the Commission intends that revenues generated by increases authorized herein, over and above the amount needed for increased material and supply costs, other than fuel, will be used by the respondents exclusively for reducing deferred maintenance of plant and equipment and delayed capital improvements in order that rail *service* to the shippers will be improved. The Commission expects that the authorized increases will enable the respondents' to expend substantially more for maintenance and capital improvements than in recent years and will evaluate respondents' compliance with this directive. Respondents' failure to apply the increased revenues as heretofore specified will result in the cancellation of these authorized increases. The Commission will determine whether cancellation should be ordered after evaluation of each of the reports required by the conditions set forth in subparagraph 4, of the second ordering paragraph hereof. In any event, on or before June 30, 1975, the Commission will determine whether the increase so authorized should be allowed to expire or be made permanent.

It is further ordered, That in making effective any increases in rates and charges herein authorized, the carriers which are parties to this proceeding be, and they are hereby, required to maintain and preserve all existing port relationships (including those involving Great Lakes and Pacific Coast ports) duly established by order of the Commission or recognized customs of the trade, and to observe the prohibitions of the In-

terstate Commerce Act with regard to unjust discrimination and undue and unreasonable preference and prejudice;

It is further ordered, That copies of any tariff filed hereunder shall be transmitted by first-class mail to all parties at the same time as the official filing at the Commission;

And it is further ordered, That all outstanding orders of the Commission be, and they are hereby, modified to permit the increases authorized herein to become effective.

FOURTH SECTION ORDER NO. 20457

It appearing, That carriers parties to the proceeding applied for relief from the provisions of Section 4 of the Act necessary to establish the rates and charges originally sought; that the increases in rates and charges authorized herein cannot be published and made effective without producing in some instances rates or charges that yield greater compensation in the aggregate for the transportation of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, or greater compensation as a through rate or charge than the aggregate-of-intermediate rates or charges subject to the Act, in contravention of Section 4 thereof; that the increased cost of railroad operation necessitates the increases in rates and charges involved in this proceeding which cannot be made effective without fourth-section relief; that application

of the increased charges to or from more distant points will not result in the establishment of rates to or from more distant points that are not reasonably compensatory; that no protestant adequately opposed issuance of the fourth-section relief sought on the ground that it would be adversely affected by the fourth-section departures that may be created by the increased rates; and that a special case has been presented in which the Commission may authorize relief from the provisions of Section 4:

It is ordered, That carriers subject to the Interstate Commerce Act and parties to said proceeding be, and they are hereby, authorized to establish and maintain the increased rates and charges described herein without observing the provisions of Section 4 of the Act;

It is further ordered, That parties to said proceeding be, and they are hereby, authorized to establish and maintain rates and charges permitted to become effective in this order without observing the long-and-short-haul provisions of Section 4 of the Act in cases arising out of the failure to apply the full increases in rates and charges over interstate routes between points in a single State, in turn caused by the failure of the State authorities to authorize the full increases permitted in this proceeding;

It is further ordered, That in those instances in which rates in contravention of Section 4 are established under authority contained herein, the scheduled containing such rates shall make reference to

this order in the manner required by Rule 28 of Tariff Circular No. 20;

And it is further ordered, That the fourth section relief granted herein shall expire with June 30, 1975.

AMENDMENT TO SPECIAL PERMISSION No. 74-3440, AUTHORIZING CERTAIN DEPARTURES FROM THE COMMISSION'S PUBLISHED TARIFF REGULATIONS

It is ordered, That Special Permission No. 74-3440, be, and it is hereby, amended to permit the establishment of the increases in freight rates and charges authorized by the Commission in this order, subject to the terms, conditions and limitations provided therein.

By the Commission. (Commissioners O'Neal and Clapp dissenting; Vice Chairman MacFarland not participating).

ROBERT L. OSWALD
Secretary

[SEAL]

VIEWS OF COMMISSIONER O'NEAL ON

EX PARTE NO. 305

NATIONWIDE INCREASE OF TEN PERCENT IN FREIGHT RATES AND CHARGES, 1974

The June 3 order in effect allows the railroads to take the full ten percent surcharge which they seek, despite the fact that our own staff analysis indicates that no more than three percent is justified on the basis of increases in costs since the Commission authorized the latest general rate increase of four percent on an interim basis.

By August 19 we are requiring the railroads to provide an "estimate" of the costs of deferred plant and equipment maintenance. This data requirement is quite loose. Only an estimate is required, and what constitutes "deferred" maintenance is neither clearly defined nor subject to exact measurement. Most railroads have an optimum goal of a high level of maintenance of their facilities, although in fact they may be able to operate efficiently at a level of maintenance far short of that. The gap between present maintenance performance and whatever level of maintenance the carrier wishes to posit can be used to define the area of "deferred" maintenance, and this area may be arbitrarily expanded or contracted depending on the level of maintenance the carrier assigns itself as a goal. Thus the "cost" attributed to deferred maintenance can be varied almost at will.

No evidence is required by the Commission as to the second major non-cost related justification behind the ten percent increase, the need to attract capital.

The Commission's economists are of the view that there are several railroads financially able to make capital expenditures and capable of raising funds in the private capital market. The problem is accentuated because of the financial plight of certain marginal and bankrupt roads. Yet the financial data which they believe should be produced regarding the need and ability of the various railroads to attract capital is not required by the June 3 order.

With reference to this increase the Commission's own staff experts believe the Commission should require each railroad to provide a detailed explanation of revenue need and a plan for applying revenues derived from rate increases based on that need *before* authorizing additional increases.

The June 3 order puts the cart before the horse. It authorizes the increases and requires evidence later. The level of data required is not as detailed or extensive as it should be. The railroads should be required to justify increases before they get them, not afterward. Vague, general allegations as to need for additional revenue do not constitute adequate justification.

The June 3 order does provide a sanction for carriers who take the increase and do not apply it for the purpose for which it was granted. Such increases may be cancelled and refunds may be ordered. However, given the interrelated nature of an ex parte

general rate increase, it will be extremely difficult to cancel part of the increase once granted. Therefore the sanction appears to be unwieldy and potentially unworkable. The result is that what teeth appear to exist in the order may prove to be false.

The order provides a compliance monitoring device by providing that the revenues generated by the increases should be expended for deferred capital improvements and maintenance of plant and equipment, and requires that records be kept. However, no provision is made to assure that other revenues now being expended or projected for maintenance and capital improvements will not be diverted to other spending. If a net increase in expenditures for the designated purpose does not result, all the reporting and compliance machinery are a waste of everyone's time and energy.

In addition, the railroads did not comply with a number of the requirements laid down in prior general increase proceedings. They did not show how much of prior authorized increases they have actually taken, as required by the Commission in Ex Parte No. 295. They only partially complied with the interim guidelines set forth in Ex Parte No. 281, for the submission of cost and revenue data. And they did not provide detailed background material and work papers in this proceeding.

I would have approved a 2 percent interim increase and would have required the railroads to submit detailed plans as a condition precedent to receiving any increases above 2 percent. We would thereby have

taken advantage of this opportunity to foster giant strides toward improved rail service. The order I would have approved would hopefully be self-executing in nature, and designed to make achievement of the goal of improved service more certain.

Since 1967 the Commission has allowed rail across the board increases totalling more than 60 percent (excluding such special increases as those for mechanical protection service and the 10% grain increase authorized this year). In each of those cases the Commission has admonished the carriers to improve service. However, the carrier's service reports to the Commission have been practically useless and, not surprisingly, rail service has gone steadily downhill. The time to begin changing the future is now. We cannot expect carrier compliance with any of our admonitions without developing the necessary incentives or fashioning *effective* sanctions.

APPENDIX G

SERVICE DATE
Jul. 22, 1974

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 18th day of July, 1974.

EX PARTE NO. 305

NATIONWIDE INCREASE OF TEN PERCENT IN FREIGHT RATES AND CHARGES, 1974 (REPORTING RQUIREMENTS)

It appearing, That pursuant to order dated June 4, 1974, most of the Nation's railroads established increases in rates and charges, effective June 20, 1974, subject to conditions specified in said order;[1]

It further appearing, That the petitioning rail carriers by refiling of the tariff of increased rates and charges have accepted the conditions imposed by this Commission in ordering paragraph four of its order served June 4, 1974, which provided that the funds generated by the authorized increases, over and above the increased costs of materials and supplies other than fuel, shall "be used by the respondents exclusively for reducing deferred maintenance of plant and equipment and delayed capital improvements in order that rail service to the shippers wil' be improved;"

[1] The Long Island Rail Road did not join in the increases and is not subject to the conditions hereinafter set forth.

For purposes of this order, deferred maintenance is defined as the accrued deterioration or deficiency in the physical operating condition of railroad track structures, cars and locomotives, and other property used in the provision of transportation service resulting from the failure and/or inability to properly maintain plant and equipment, which produces an adverse effect on railroad operations to an extent that services to shippers have been rendered partially or wholly inadequate and/or has resulted in diminishing the railroads' competitive ability;

For purposes of this order, delayed capital improvements represent actually planned, specifically identified capital improvements necessary for the provision of adequate or improved transportation service to shippers and which had not been undertaken, scheduled, or otherwise committed because funding or financing was not, or projected to be, available through June 30, 1975. They exclude improvements in progress and those scheduled or otherwise committed and recognized in capital budgets in effect or applicable on June 1, 1974. These capital improvements are further identified as delayed expenditures which would (1) add to or improve the carriers' plant and/or equipment so as to increase its usefulness, capacity, durability and efficiency, and (2) which are capitalizable in the property accounts in accordance with the Commission's accounting regulations;

For purposes of this order, expenditures for deferred maintenance and delayed capital improve-

ments will be deemed to be expenditures in excess of the maintenance and capital expenditures which have been budgeted for the 3rd and 4th calendar quarters of 1974 and estimated expenditures which would normally be budgeted for the 1st and 2nd calendar quarter of 1975 providing the estimates for these two calendar quarters equal or exceed the average level of maintenance and capital expenditure for the first six months of the years 1971-1974, inclusive on a current dollar basis.

It further appearing, That the said order requires each carrier on or before August 19, 1974, to provide this Commission with certain estimates of the costs of deferred plant and equipment maintenance and related information as of June 30, 1974, as well as a report of the annual maintenance and capital expenditures for the years 1971-1973, inclusive, the 1st and 2nd calendar quarters of 1974, and estimated maintenance and capital investments for the 3rd and 4th calendar quarters of 1974, and the first two calendar quarters of 1975;

It further appearing, That the said order requires the railroads to maintain a monthly record of the increased revenues derived from the increased rates; and, that said increases as well as expenditures thereof be reported to this Commission at the end of the 3rd, 6th, and 9th months following the effective date of the increases;

And it further appearing, That to assure consistency and comparability in said reports, records

and estimates, it is necessary to provide implementing instructions;

Wherefore, and for good cause:

It is ordered, That the accounting requirements set forth in Appendix 1 hereto, shall be implemented by all railroads which are parties to this proceeding and for whose account TARIFF OF INCREASED RATES AND CHARGES, X-305-A, and supplements thereto, are applicable.

It is further ordered, That class I line-haul railroads, as above specified, are directed to file certified data and information required by this order;[2]

It is further ordered, That subparagraph number 4 of ordering paragraph four be changed to read:

"4. On or before the fifteenth day of the second month following the end of the third and fourth calendar quarters of 1974 and the first and second calendar quarters of 1975, each class I line-haul railroad shall provide this Commission with an estimate of the freight revenues generated by the increases; and estimate of the costs of deferred plant and equipment maintenance; number and percent of bad order cars by type;[3] and miles of track by class

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[2] The data should be furnished individually by carrier and then summarized by district, and nationwide; the methods used to deprive the estimates must be reflected, including assumptions used; and all underlying workpapers must be made available to the Commission upon request.

[3] Type of car as used herein includes box, refrigerator, gondola, hopper, covered hopper, flat, company service cars, and others.

on which slow orders were in effect. The report for the third quarter of 1974 should include an estimate of the freight revenues generated by the increases for the period of June 20, 1974, through June 30, 1974. Additionally, each carrier shall report the amount of expenditures made for deferred maintenance of plant and equipment, e.g., by type of car, track, crossties, etc. as well as amounts expended for delayed capital improvements by type of project. Further each carrier shall report the amount of unexpended funds derived from the authorized increases and how these funds are to be expended."

It is further ordered, That up to 3 percentage points of the 10-percent authorization may be applied to increased material and supply costs, excluding fuel, provided such costs have been incurred. Of the remaining amount of increased revenues, increased income taxes may be excluded in determining the balance of the funds to be applied to deferred maintenance and delayed capital improvements in accordance with the methods outlined in Appendices 6 and 7 hereto;

It is further ordered, That on or before August 19, 1974 each of the class I line-haul railroads embraced by this order shall submit to this Commission a report showing for each month from October 1, 1973 to June 30, 1974, the amount of increase or decrease in the cost of materials and supplies, other than fuel, due to price changes. Moreover, the amount of increase or decrease reflected by month for each quarter thereafter shall be included in the railroads'

quarterly reports required in this proceeding. Such increases may be estimated if the procedures for the estimations are explained in the report to the Commission;

It is further ordered, That the costs of deferred maintenance and delayed capital improvements shall be estimated on the basis of wage rates, prices of materials and supplies, and maintenance operation procedures in effect June 30, 1974;

It is further ordered, That each class I line-haul railroad is directed to file the following data and information by August 19, 1974, with this Commission:

a. For the period January 1, 1971 through June 30, 1974, by calendar quarters:

(1) Actual expenditures for the maintenance of plant and equipment in accordance with the accounts listed in Appendices 2 and 3.

(2) Capital expenditures in accordance with accounts listed in Appendix 4.

(3) Cost and numbers of physical units for ties and rails in accordance with the accounts shown in Appendix 5.

b. As of June 30, 1974;

(1) The amount of deferred maintenance of plant and equipment by type of car, locomotives, plant, including yard and way switching track and running track, and other similar classes of property and facilities. The estimate should in-

clude total costs and physical units. A separate submission of deferred maintenance of segments of lines subject to pending applications for abandonment shall be submitted.

(2) The amount of delayed capital improvements in accordance with accounts listed in Appendix 4.

(3) The number and percent of bad order cars by type of car.

(4) Number of locomotives owned and leased and number in service.

(5) The number of slow orders and the number of miles of track by class on which slow orders were in effect. Slow orders placed during routine maintenance should not be included. Slow orders in effect January 1, 1974, which were eliminated by subsequent reductions in operating schedules without overcoming the cause of the slow order should be included and so designated.

c. For each of the four calendar quarters, July 1, 1974 through June 30, 1975, each reporting carrier shall disclose:

(1) Estimated revenues to be derived from the Ex Parte No. 305 increases in accordance with Appendix 6.

(2) Estimated total expenditures for maintenance of plant and equipment in accordance with the accounts listed in Appendix 2 and Appendix 3 and estimated capital expenditures in accordance with the

accounts listed in Appendix 4, in terms of July 1974 dollars. Show separately the amount of increased revenues to be obtained from the authorized increases which will be applied to these expenditures.

(3) If conditions warrant, revised estimates for the first two calendar quarters of 1975 may be resubmitted in light of final budget determinations.

It is further ordered, That the individual railroads provide this Commission on or before November 15, 1974, February 15, 1975, May 15, 1975, and August 15, 1975, the following data and information as of the close of the calendar quarter:

a. Freight revenues generated by the increases authorized by this Commission's order of June 4, 1974, in the format shown in Appendix 7. The filing for the calendar quarter ending September 30, 1974, should also include a separate disclosure of the revenues generated from Ex Parte No. 305, for the period of June 20, 1974, through June 30, 1974, in a manner consistent with that described in Appendix 7 hereto.

b. Total actual expenditures for the maintenance of plant, equipment and expenditures for capital improvements in accordance with the accounts listed in Appendices 2, 3, and 4, and the portions thereof representing applications of the Ex Parte No. 305 increases.

c. Cost and numbers of physical units for ties and rails in accordance with the accounts shown in Appendix 5.

d. The number and percent of bad order cars by type.

e. The number of slow orders and the number of miles of track by class on which slow orders were in effect.

f. Deferred maintenance of plant and equipment and delayed capital improvements.

g. A report as to anticipated expenditures of the balance of the funds in Account 716, Capital and Other Reserve Funds.

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy in the office of the Commission's Secretary and by filing a copy with the Director, Office of the Federal Register, for publication in the Federal Register.

This is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

By the Commission.

ROBERT L. OSWALD
Secretary

[SEAL]

EX PARTE NO. 305

Accounting Instructions

1. *Funds Realized from Increased Freight Charges*

a. The portion of the funds representing up to 3 percentage points of the 10-percent authorization, applicable to increased material and supply cost, other than fuel, shall be included in account 701, Cash.

b.1. The remainder of the funds representing the portion applicable to deferred maintenance and delayed capital improvements, shall be segregated in account 716, Capital and Other Reserve Funds. These funds shall be reduced by the amount of any additional Federal, State or other *income taxes paid as the result of increasing taxable income by inclusion of the related increased freight charges.* Taxable income should include the effect of applicable tax benefits. No income tax deduction shall be made in cases where the accounting carrier files a separate income tax return or is included in a consolidated return but incurs no actual income tax liability.

2. The unexpended portion of the funds remaining in account 716, Capital and Other Reserve Funds, may be invested in Government bonds or similar interest-bearing temporary investments. Thereafter the interest income received from such investments shall be included in account 716 as part of the segregated funds. The interest received shall be reduced by the amount of any additional Federal, State or other in-

come taxes paid as a result of increasing taxable income by inclusion of the related interest earnings.

3. Account 716, Capital and Other Reserve Funds, shall be maintained in sufficient detail so as to show separately (1) amounts received and expended monthly, allocated between deferred maintenance, delayed capital improvements, and income taxes, (2) income resulting from investment of such funds, and (3) the balance at the end of each month.

2. *Revenue Derived from Increased Freight Charges*

a. The total amount of revenues derived from the increased freight charges shall be included in account 101, Freight, or other appropriate revenue account. The increased freight revenues may be estimated if the procedure for the estimation is explained.[1]

b. Account 101, Freight, as well as other revenue accounts, shall be maintained in sufficient detail to enable separate reporting of the total amount of revenues derived monthly from the increased freight charges applicable to the allowance for increased material and supply cost, other than fuel, increased income taxes, and the remainder for deferred maintenance and delayed capital improvements.

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[1] Although not adopted by this Commission, attention is directed to a Bureau of Economics' report, *Guidelines for the Presentation of the Results of Sample Studies*, Statement No. 71-1, February, 1971, available from the Superintendent of Documents, U. S. Government Printing Office, Washington, D.C. 20402, price 50 cents.

3. *Supporting Records*

Records shall be maintained so as to furnish readily full information to support the amounts for each entry recorded in account 701, Cash, account 716, Capital and Other Reserve Funds, account 101, Freight, and other appropriate accounts, which relate to the increased freight charges. The information shall be of sufficient detail to permit ready identification, analysis and verification of all the relevant facts, including the basis used for determining the amounts recorded for the increased freight charges.

Listing of Selected Maintenance of Way and Structures Accounts
(dollars in thousands)

Account Number	Account Title	Yard Switching Tracks	Way Switching Tracks	Running Tracks	Total
201	Superintendence	XXX	XXX	XXX	$—
202	Roadway maintenance	$	$	$	$
212	Ties				
214	Rails				
216	Other track material				
220	Track laying and surfacing				
206, 208, 210, 218, 221	Other track accounts				
	Sub total	$—	$—	$—	$—
227	Station and office buildings				$—
235	Shops and engine houses				$
247	Communication systems				
249	Signals and interlockers				
269	Roadway machines				
271	Small tools and supplies				
277	Employees' health and welfare benefits				
227-282, excluding above and 266, 267	Other maintenance accounts				
	Sub total				—
278	Maintaining joint tracks, yards, and other facilities—Dr.				$—
279	Maintaining joint tracks, yards, and other facilities—Cr.				
	Sub total				—
					$—
Total of above					$—
266	Road property—depreciation				$—
267	Retirements—road				$—
	Total				$—
	Grand Total—Maintenance of way and structures				$—
	Total—Freight expense				$—
	Total—Passenger expense				$—

EX PARTE NO. 305

Listing of Selected Maintenance of Equipment Accounts
(dollars in thousands)

Account Number	Account Title	Total
301	Superintendence	$
302	Shop machinery	
311	Locomotive—repairs	
	yard	
	other	
314	Freight train cars—repairs	
317	Passenger train cars—repairs	
335	Employees' health and welfare benefits	____
	Sub total	$
304, 306, 318, 323, 326, 328, 329, 332, 333, 334, 339	Other maintenance accounts	____
	Sub total	$____
336	Joint maintenance of equipment expenses—Dr.	
337	Joint maintenance of equipment expenses—Cr.	____
	Sub total	$
305, 330, 331	Depreciation and Retirements	____
	Grand Total—Maintenance of equipment	$
	Total freight expenses	$
	Total passenger expense	$____

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EX PARTE NO. 305

List of Selected Capital Investments
(Dollars in Thousands)

Account		Expenditures for Original Road and Equipment and Road Extensions	Expenditures for Purchase of Existing Lines, etc.	Expenditures for Additions and Betterments	
				Owned Property	Leased Property
(1)		(2)	(3)	(4)	(5)
(3)	Grading	$	$	$	$
(6)	Bridges, trestles, & culverts				
(8)	Ties				
(9)	Rails				
(10)	Other track material				
(11)	Ballast				
(12)	Track laying and surfacing				
(20)	Shops and enginehouses				
(25)	TOFC/COFC terminals				
(26)	Communication systems				
(27)	Signals and inter lockers				
(29)	Power plants				
(37)	Roadway machines				
(44)	Shop machinery				
(45)	Power-plant machinery				
xx	All Other Road				
xx	Total Road Expenditures	$____	$____	$____	$____
	Equipment				
(52)	Locomotives	$	$	$	$

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(53)	Freight-train cars				
(55)	Highway revenue equipment				
(57)	Work equipment				
xx	All Other Equipment				
xx	Total Equipment Expenditures				
xx	Total General Expenditures				
(80)	Other elements of investment				
(90)	Construction work in progress				
xxx	Grand Total—All Investment Accounts	$	$	$	$

EX PARTE NO. 305

Report of Ties and Rails
(Costs in thousand dollars)

Account		
	Total costs of ties laid for:	
	A. Replacement of:	
513	(1) cross ties	$
513	(2) switch & bridge ties	
	B. Additional track, etc.:	
514	(1) cross ties	
514	(2) switch & bridge ties	
	Total cost of rails laid for:	
	A. Replacement of:	
515	(1) running, etc.	
515	(2) yard, etc.	
	B. Additional track, etc.:	
516	(1) running, etc.	
516	(2) yard, etc.	
	Total ties laid for:	
	A. Replacement of:	
513	(1) cross ties (# of ties)	
513	(2) switch & bridge ties (# of feet)	

	B. Additional track, etc.:	
514	(1) cross ties (# of ties)	
514	(2) switch & bridge ties (# of feet)	
	Total rails laid for:	
	A. Replacement of:	
515	(1) running, etc. (# of tons)	
515	(2) yard, etc. (# of tons)	
	B. Additional track, etc.:	
516	(1) running, etc. (# of tons)	
	(2) yard, etc. (# of tons)	

EX PARTE NO. 305

Estimated Revenues
To Be Obtained

_____ Quarter, 197__

_____ Railroad

1. Estimated Freight Revenues including Ex Parte No. 305	$
2. Estimated ton-miles	
3. Estimated Revenue per ton-mile (1 ÷ 2)	$
4. All other revenues—estimated including Ex Parte No. 305	$
5. Total Estimated Revenues including Ex Parte No. 305 (1 + 4)	$
6. Total Estimated Additional Revenues from Ex Parte No. 305	
7. Total estimated revenues excluding Ex Parte No. 305 (5 − 6)	$
8. Estimated increase in costs of material and supplies, other than fuel (not to exceed 3 percentage points of the 10-percent authorization)	
9. Allowance for increased income taxes [1]	
10. Estimated yield to be applied to deferred maintenance and delayed capital expenditures [6 − (8 + 9)]	$

[1] Estimated Income taxes should include the effect of applicable tax benefits. Tax allowance shown on line 9 is to be on an incremental basis and determined as follows:

a. Income Taxes based on estimated revenues on line 5	$
b. Income Taxes based on estimated revenues on line 7	
c. Allowance for increased income taxes a − b	$

NOTE: Fully explain the methodology employed in arriving at the revenue data shown on lines 1, 4 and 6. (See Footnote 1 of Appendix 1)

EX PARTE NO. 305

Revenues Obtained

_____ Quarter, 197__

_____ Railroad

1.	Actual Freight Revenues incl. Ex Parte No. 305	$
2.	Actual ton-miles	_____
3.	Revenue per ton-mile (1 ÷ 2)	$
4.	All other revenues—including Ex Parte No. 305	$_____
5.	Total Revenues including Ex Parte No. 305	$
6.	Total Additional Revenues from Ex Parte No. 305	_____
7.	Total revenues excluding Ex Parte No. 305 (5 − 6)	$
8.	Increase in costs of material and supplies, other than fuel (not to exceed 3 percentage points of the 10-percent authorization)	
9.	Allowance for increased income taxes [1]	_____
10.	Actual yield to be applied to deferred maintenance and delayed capital expenditures [6 − (8 + 9)]	$

[1] Estimated Income Taxes should include the effect of applicable tax benefits. Tax allowance shown on line 5 is to be on an incremental basis and determined as follows:

a. Income Taxes based on revenues on line 5 ..... $

b. Income Taxes based on revenues on line 7 ..... _____

c. Allowance for increased income taxes a − b ..... $

NOTE: Fully explain the methodology employed in arriving at the revenue data shown on lines 1, 4 and 6. (See Footnote 1 of Appendix 1)

EX PARTE NO. 305

Funds Segregated in Account 716

		This Quarter	Cumulative
1.	Balance at beginning of quarter	xxx	$
2.	Funds received from increased revenues	$	xxx
3.	Income from investment of funds	_____	xxx
4.	Total (sum of 2 and 3)	$	xxx
5.	Income taxes paid on funds received and income from investments	_____	xxx
6.	Total addition to account 716 (4 minus 5)	xxx	_____
7.	Total (sum of 1 and 6)	xxx	$
8.	Funds expended:		
9.	a. Deferred maintenance	$	xxx
10.	b. Delayed capital improvements	_____	xxx
11.	Total expenditures (sum of 9 and 10)	xxx	_____
12.	Balance in account 716, , 19__ (7 minus 11)	xxx	$

APPENDIX H

SERVICE DATE
Aug. 12, 1974

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 9th day of August, 1974.

EX PARTE NO. 305

NATIONWIDE INCREASE OF TEN PERCENT IN FREIGHT RATES AND CHARGES, 1974
(Reporting Requirements)

Upon consideration of the record in the above-entitled proceeding, the orders dated June 3, 1974, and July 18, 1974, and of:

(1) Petition filed July 18, 1974, by the Construction Aggregate Rail Shippers Conference, Inc., (CARS), for modification of the June 3, 1974, order making more definite and certain the requirement that revenue increases be expended by the railroads for capital improvements and deferred maintenance;

(2) Petition filed July 31, 1974, on behalf of railroad respondents for clarification and modification of the order dated July 18, 1974;

(3) Separate petition filed July 30, 1974, by the Chesapeake and Ohio Railway Company, the Baltimore and Ohio Railroad Company, and Western Maryland Railway Company (Chessie System), for reconsideration and amendment of the order dated July 18, 1974;

(4) Petition filed July 30, 1974, by the Trustees of Penn Central Transportation Company, Debtor, (Penn Central), for reconsideration and modification of the order dated July 18, 1974;

(5) Petition filed July 12, 1974, by the American Short Line Railroad Association (Short Lines) for modification of the order dated June 3, 1974;

(6) Replies filed July 22 and August 1, 1974, by Diamond Crystal Salt Company and The National Industrial Traffic League, respectively, in opposition to relief sought by Short Lines;

(7) Reply filed August 7, 1974, by railroad respondents in opposition to CARS' petition for modification; and

It appearing, That petitioner, CARS, in (1) above seeks modification of the June 3, 1974, order to require, as a condition of the authority granted for the increases in rates and charges, that at least 50 percent of the increased revenue derived from traffic using open-top equipment, including construction aggregates, be devoted to the purchase or rebuilding of suitable equipment for the movement of such traffic and that these capital improvement expenditures must be in addition to expenditures in a base period prior to the entry of the order dated June 3, 1974;

It further appearing, That the railroad respondents in (2) above, seek modification and clarification of the order dated July 18, 1974, in the following respects:

(1) Elimination of the exclusion of improvements in progress and those scheduled or otherwise committed and recognized in capital budgets in effect or applicable on June 1, 1974, or

(2) Substitution of January 1, 1974, for June 1, 1974, in line 8 of paragraph 4 of the order;

(3) Modification of paragraph 5 of the July 18, 1974, order by deleting reference to estimated expenditures which would normally be budgeted for the first and second calendar quarter of 1975 and substitution therefor of the average amount of maintenance and capital expenditures for the first six months of the years 1971-1974;

(4) Interpretation of paragraph 5 of the July 18, 1974, order as meaning that the excess of expenditures for maintenance and capital programs over the referenced bases is, prima facie, allowable as deferred maintenance or delayed capital improvements, assuming the changes requested in (2) and (3) above, are granted;

(5) Modification of the definition of deferred maintenance in the third paragraph of the July 18, 1974, order to include deferred maintenance programs which would result in improved service;

(6) Modification of the definition of delayed capital improvements by adding the following at the end of the first sentence, in paragraph 4 of said order, "on a basis acceptable to prudent management," and to embrace new capital improvement programs required by changes in traffic levels or traffic mix; and

(7) Postponement of the August 19, 1974, report filing date for material regarding the identification of maintenance and capital programs and certain data which must be estimated for 30 days following the disposition of the respondents' petition;

It further appearing, That petitioner, Chessie System, in (3) above, seeks to amend the July 18, 1974, order by adding a new ordering paragraph permitting a railroad to expend the funds generated by the authorized increases for any valid corporate purpose if it should have no deferred maintenance or delayed capital improvements as defined in the order and for postponement of the August 19, 1974, reporting date pending disposition of the Chessie System's petition;

It further appearing, That petitioner, Penn Central, in (4) above, seeks modification of the July 18, 1974, order to permit railroads in reorganization to transfer funds segregated in Account 716, Capital and Other Reserve Funds, to Account 701, Cash, if necessary, to meet cash requirements for continued operations;

It further appearing, That petitioner, Short Lines, in (5) above, seeks modification of June 3, 1974, order to relieve other than class I line-haul railroads from the record keeping and reporting requirements imposed therein;

It further appearing, That the Commission has consistently expressed its full intention that the authorized increases, over and above the increased costs of materials and supplies, other than fuel, shall be used by the respondents exclusively for reducing deferred maintenance of plant and equipment and de-

layed capital improvements in order that rail service to the shippers will be improved;

It further appearing, That while the Commission intends that the authorized increases shall be used for deferred maintenance and delayed capital improvements, it leaves to the railroad managements' decision how the funds segregated in accordance with the July 18, 1974, order shall be applied to expenditures for the various specific items of equipment and other properties;

It further appearing, That as used in the definition of deferred maintenance, "wholly or partially inadequate" in relation to services to shippers has reference to the rule of ratemaking, cited in the order of June 3, 1974, authorizing the rate increases, which requires, *inter alia*, our consideration of "the need, in the public interest, of *adequate* and efficient railway transportation service at the lowest cost consistent with the furnishing of *such service*; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide *such service*" [Emphasis added];

It further appearing, That the definitions of deferred maintenance and delayed capital improvements provided in said order particularly reserves to the management of each railroad in the exercise of its proper and prudent managerial functions the determination of the extent to which these conditions exist in respect to their properties;

It further appearing, That the petition and verified statements of railroad officials seeking the increases authorized herein are replete with references to the need for revenues to provide funds for great, but unspecified, amounts of deferred maintenance and delayed capital improvements;

It further appearing, That the accounting and reporting requirements as defined and specified in the order of July 18, 1974, except to the extent herein modified, are necessary for the Commission to be informed about the extent of deferred maintenance and delayed capital improvements which must be overcome to provide adequate and improved service to shippers, as specifically identified as of June 30, 1974, by railroad management;

It further appearing, That without such specific information, the Commission would have no reasonable basis for determining whether the authorized increases were being applied as intended, whether cancellation should be ordered after evaluation of each of the required reports, and whether on or before June 30, 1975, the increases should be allowed to expire or be made permanent;

It further appearing, That certain railroads, as asserted in the respondents' petition, may have anticipated authorization of the increases by initiating improvement projects, or scheduling or otherwise committing and recognizing them in capital budgets prior to June 1, 1974, and if such were the circumstances and the projects otherwise qualify as delayed capital improvements, it would be consistent with the Commission's intention that the authorized increases could be applied thereto;

It further appearing, That the President of Penn Central in his verified statement in this proceeding last April asserted that "On an annual basis, Penn Central, after relieving the pressures of a chronic cash deficit, would allocate more than $100 million of the total increased revenue of the $170 million to stepped-up track work and equipment repairs", and in view of the accrued deterioration in the Penn Central's plant and equipment, the relief requested does not appear warranted at this time;

And it further appearing, That the Short Lines have already been granted relief from the reporting requirements and, in the absence of the record keeping requirements, no means would be available to assure that the increases were applied as intended by the Commission;

Wherefore, and for good cause:

It is ordered, That the date, "June 1, 1974" in the fourth paragraph of the July 18, 1974, order shall be deleted and "January 1, 1974," be, and it is hereby, substituted therefor:

It is further ordered, That the filing date in the seventh ordering paragraph of the order, "August 19, 1974," shall be deleted and "September 3, 1974", be, and it is hereby substituted therefor, and that the original and fourteen (14) copies of each report be filed with the Bureau of Accounts, Interstate Commerce Commission, Washington, D. C. 20423.

It is further ordered, That, in all other respects, the petitions in (1), (2), (3), (4), and (5) be, and they are hereby, denied.

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy in the office of the Commission's Secretary and by filing a copy with the Director, Office of the Federal Register, for publication in the Federal Register.

By the Commission.

ROBERT L. OSWALD
Secretary

[SEAL]

APPENDIX I

SERVICE DATE
Aug. 22, 1974

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 21st day of August, 1974.

EX PARTE NO. 305

NATIONWIDE INCREASE OF TEN PERCENT IN FREIGHT RATES AND CHARGES, 1974.
(Reporting Requirements)

Upon consideration of the record in the above-entitled proceeding, the orders dated June 3, 1974, July 18, 1974 and August 9, 1974, and of:

(1) Petition filed August 5, 1974, by the Chicago and North Western Transportation Company (CNW) for reconsideration and modification of the order dated July 18, 1974;

(2) Petition filed August 2, 1974, by the Trustees of Reading Company, Debtor, (Reading), for reconsideration and modification of the order dated July 18, 1974;

(3) Petition filed August 7, 1974, by the Trustees, Lehigh Valley Railroad Company (Lehigh), for reconsideration and modification of the order dated July 18, 1974;

(4) Petition filed August 9, 1974, by the Missouri-Kansas-Texas Railroad Company (MKT) for

reconsideration and modification of the order dated July 18, 1975;

(5) Petition filed August 9, 1974, by the Chicago, Rock Island and Pacific Railroad Company (Rock Island) for reconsideration and modification of the order dated July 18, 1974;

(6) Petition filed August 13, 1974, by the Chicago South Shore and South Bend Railroad (Chicago South Shore) for reconsideration of the Commission's order dated July 18, 1974;

(7) Petition filed August 15, 1974, by the Trustee for The Central Railroad Company of New Jersey (CNJ) for reconsideration and modification of the Commission's order dated July 18, 1974;

(8) Petition filed August 16, 1974, by respondent railroads for leave to file and accompanying supplemental petition for clarification and modification of the Commission's orders dated July 18 and August 9, 1974;

(9) Statement filed August 20, 1974, by the United States Railway Association in support of the railroads' supplemental petition in (8) above; and

(10) Reply filed August 20, 1974, by the Chesapeake and Ohio Railway Company, The Baltimore and Ohio Railroad Company and Western Maryland Railway Company (Chessie System) to the railroads' supplemental petition in (8) above;

It appearing, That petitioner CNW in (1) above seeks modification of the July 18, 1974, order in the following respects:

1. "Adoption of actual expenditures made by a railroad in the years 1971 through 1973 as the base

period" for determining allowable uses of the authorized increases;

2. Modification of fourth ordering paragraph of the July 18, 1974, order to allow a railroad to use the proceeds of the authorized increases to meet actual increased material and supply costs, other than fuel;

It further appearing, That petitioners, Reading and Lehigh, in (2) and (3) above, seek modification of the July 18, 1974, order to permit railroads in reorganization to transfer funds segregated in Account 716, Capital and Other Reserve Funds, to Account 701, Cash, if necessary, to meet cash requirements for continued operations;

It further appearing, That petitioner, MKT, in (4) above seeks modification of the July 18, 1974, order so as to permit any railroad to retain in Account 701, Cash, rather than segregating in Account 716, Capital and Other Reserve Funds, all revenues derived from the authorized increases in any month in which the current liabilities (excluding debt maturing in one year) of such railroad shall exceed its current assets; and to thereby use all amounts in Account 701, Cash, for any corporate purpose;

It further appearing, That petitioner, Rock Island, in (5) above seeks relief from the requirements in connection with Account 716, Capital and Other Reserve Funds, to allow transfers to Account 701, Cash, when management deems it necessary to pay current operating expenses in order to continue pro-

viding the shipping public with the best service possible; for a 30-day postponement of the due dates for the reports required by the July 18, 1974, order of freight revenues generated by the authorized increases and funds segregated in Account 716, Capital and Other Reserve Funds, in the format shown in Appendix 7 of said order; and postponement of the August 19, 1974, due date for reports in accordance with Appendices 2, 3, 4, and 5 of said order with permission to submit the historical data of 1971, 1972, and 1973, on an annual instead of quarterly basis;

It further appearing, That petitioner Chicago South Shore, in (6) above, seeks (1) exemption from the reporting requirements of the Commission's order because its accounts are maintained in compliance with the Uniform System of Accounts for Electric Railways which differs from the Uniform System of Accounts applicable to Class I Steam Carriers; and (2) permission to expend the funds generated by the authorized increase for normal capital outlays, normal maintenance and other corporate purposes on the ground that it has no deferred maintenance nor delayed capital improvements which qualify under the definitions set forth in the Commission's order of July 18, 1974;

It further appearing, That respondent railroads in their supplemental petition, in (8) above, request clarification and amendment of the Commission's orders to accomplish the following two purposes:

(1) To permit funds obtained from the Ex Parte No. 305 increase to be used for new or increased maintenance and capital improvement programs; and
(2) To permit bankrupt and marginal roads to use funds obtained from the Ex Parte No. 305 increase, if necessary, to meet cash requirements for continued operation.

It further appearing, That respondent railroads suggest that the orders of July 18, 1974 and August 9, 1974, be amended by inclusion of the following language:

> "If a railroad shall have no deferred maintenance nor delayed capital improvements within the meaning of the Commission's orders of July 22, 1974 [entered July 18, 1974] or amounts less than equal to the funds segregated in Account 716, the increased revenue derived from Ex Parte No. 305 may be committed to capital improvements required to handle increased traffic levels or for improvements in the quantity and quality of its railroad service in general."

It further appearing, That the petitioners in (10) above, allege that the supplemental petition filed by the railroads does not represent the position of the Chessie System, stating further that the Chessie System should "be entitled to use such revenues [from the authorized increases] for any valid corporated purposes;"

It further appearing, That the initial order in this proceeding entered June 3, 1974, as here relevant, provided as follows:

> "Our responsibilities under the Act, *inter alia*, section 15a(2), require that we give consideration to "the need, in the public interest, of adequate and efficient railway transportation *service* at the lowest cost consistent with the furnishing of such *service*; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such *service*." (Emphasis supplied) Accordingly, as previously indicated, the Commission intends that revenues generated by increases authorized herein, over and above the amount needed for increased material and supply costs, other than fuel, will be used by the respondents exclusively for reducing deferred maintenance of plant and equipment and delayed capital improvements in order that rail service to the shippers will be improved. The Commission expects that the authorized increases will enable the respondents to expend substantially more for maintenance and capital improvements than in recent years and will evaluate respondents' compliance with this directive. Respondents' failure to apply the increased revenues as heretofore specified will result in the cancellation of these authorized increases. The Commission will determine whether cancellation should be ordered after evaluation of each of the reports required by the conditions set forth in subparagraph 4, of the second ordering paragraph hereof. In any event, on or before June 30, 1975, the Commission will determine

whether the increase so authorized should be allowed to expire or be made permanent."

It further appearing, That, as indicated by the order of June 19, 1974 in this proceeding, respondent railroads did, subject to the terms and conditions set forth in the June 3, 1974 order, publish a tariff designated X-305-A;

And it further appearing, That upon consideration of the petitions previously enumerated, the Commission on its own motion has determined (1) to reopen the proceeding and (2) to hear the parties at oral argument (before rendering a decision on the merits) in order to afford the parties an opportunity to show cause why the outstanding orders setting forth conditions governing the tariff X-305-A, should not be observed in all respects and compliance be had forthwith;

Wherefore, and for good cause:

It is ordered, That this proceeding be, and it is hereby, reopened on the Commission's own motion in accordance with the order of June 3, 1974;

It is further ordered, That an oral argument will be held before the Commission at its offices in Washington, D.C. beginning at 9:30 o'clock a.m. on August 27, 1974, for the purpose of determining the disposition of the pending petitions and whether any further action is warranted in this matter.

And it is further ordered, That the counsel representing the petitioners and Chessie System be present at the oral argument and be prepared to orally

show cause why any change should be made in the conditions and requirements contained in the outstanding orders in this proceeding. Other interested parties may attend and make representations if they so desire.

By the Commission.

ROBERT L. OSWALD
Secretary

[SEAL]

APPENDIX J

SERVICE DATE
Aug. 26, 1974

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 26th day of August, 1974.

EX PARTE NO. 305

NATIONWIDE INCREASE OF TEN PERCENT IN FREIGHT RATES AND CHARGES, 1974
(Reporting Requirements)

Upon consideration of the record in the above-entitled proceeding, including the Reply filed August 20, 1974, by the Chesapeake and Ohio Railway Company, the Baltimore and Ohio Railroad Company and Western Maryland Railway Company to the railroads' supplemental petition of August 16, 1974, for clarification and modification of the Commission's orders of July 22 and August 12, 1974; and of the Objection, filed August 26, 1974, of the Chesapeake and Ohio Railroad Company, the Baltimore and Ohio Railroad Company and Western Maryland Railway Company to the Jurisdiction of the Interstate Commerce Commission to Require the Appearance of Said Railroads at the Oral Argument of August 27, 1974; and

It appearing, That the Commission has continuing jurisdiction over its own orders, and may reopen its proceedings for further consideration at any time

notwithstanding that a judicial review action has been filed, subject only to the proviso that the Commission is without power to act inconsistently with the court's jurisdiction, *American Farm Lines* v. *Black Ball*, 397 U.S. 532, 541-42 (1970); and

It further appearing, That the order of the Commission served August 22, 1974, which *inter alia* requires counsel for the Chessie System Lines to be present at oral argument on August 27, 1974, and be prepared to show cause why any change should be made in the conditions and requirements contained in the outstanding orders in this proceeding, does not interfere with the jurisdiction of the United States District Court for the Eastern District of Virginia in Civil Action No. 74-0370-R, *Chesapeake and Ohio Railway Company, et al.* v. *United States of America, et al.*, either with respect to the Temporary Restraining Order entered by the court on August 18, 1974, or with respect to any other exercise of jurisdiction by the court at this time; and good cause appearing therefor:

It is ordered, That the Objection referred to above be, and it is hereby, overruled.

By the Commission.

ROBERT L. OSWALD
Secretary

[SEAL]

APPENDIX K

SERVICE DATE
Aug. 28, 1974

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 28th day of August, 1974.

EX PARTE NO. 305

NATIONWIDE INCREASE OF TEN PERCENT IN FREIGHT RATES AND CHARGES, 1974

Upon consideration of the record in the above-entitled proceeding and the views expressed at oral argument before the Commission on Tuesday, August 27, 1974;

It appearing, That the National Industrial Traffic League by petition and at oral argument represented that parties had not been served with copies of petitions and other pleadings filed by various railroad respondents including the Chesapeake and Ohio Railway Company, The Baltimore and Ohio Railroad Company and Western Maryland Railway Company (Chessie System);

It further appearing, That by letter dated August 26, 1974, and received August 27, 1974, the respondent railroads, except the Chessie System, advised the Commission that a copy of each of the railroad petitions will be sent to all parties of record no later than August 27, 1974;

And it further appearing, That respondent railroads, except the Chessie System, have requested an extension of time from September 3, 1974 to September 10, 1974 for filing data and information required by the orders in this proceeding;

It is ordered, That the Chessie System be, and it is hereby, directed to serve copies of its petition and reply upon all parties to this proceeding forthwith and not later than August 30, 1974.

It is further ordered, That should any respondents, including the Chessie System, file additional pleadings in this matter, they be, and they are hereby, directed to serve copies upon all parties to this proceeding.

It is further ordered, That parties to this proceeding be, and they are hereby, authorized to file replies to the railroad pleadings, including the reply of the Chessie System, within 20 days from date of service of this order. For the Commission's use, the original and 24 copies of all documents filed in accordance with this order should be sent to the Secretary, Interstate Commerce Commission, Washington, D.C. 20423, Room 5342, but a lesser number of copies may be filed upon a showing of good cause. One copy of each document shall be served (except that where parties are able to do so, 25 copies should be served) upon the representative of the petitioning railroads, Mr. Thormund A. Miller, American Railroads Building, Room 527, 1920 L Street, N.W., Washington, D.C. 20036.

And it is further ordered, That the respondent railroads' request for extension of time, as above indicated, be, and it is hereby, granted, provided that the data and information called for pursuant to our prior orders shall be filed as soon as possible but in no event later than September 10, 1974.

By the Commission.

JOSEPH M. HARRINGTON
Acting Secretary

[SEAL]

APPENDIX L

SERVICE DATE
Oct. 7, 1974

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 3rd day of October, 1974.

EX PARTE NO. 305

NATIONWIDE INCREASE OF TEN PERCENT IN FREIGHT RATES AND CHARGES, 1974

Upon consideration of the record in the above-entitled proceeding, the views expressed at oral argument before the Commission on August 27, 1974, the petitions and other pleadings detailed in our order dated August 21, 1974, and the following additional pleadings:

(1) Petition filed August 21, 1974, by the Soo Line Railroad Company for modification of the Commission's order dated July 18, 1974;

(2) Petition filed August 21, 1974, by the Grand Trunk Western Railroad Company for reconsideration and modification of the Commission's prior orders herein insofar as this petitioner is concerned;

(3) Petition filed July 3, 1974, by the Wine Institute for reconsideration of the order of the Commission dated June 3, 1974, with regard to the increase applicable to wine and winery products;

(4) Petition filed July 5, 1974, by the Pacific Northwest Grain and Grain Products Association for an order making more definite and certain the phrase "recognized customs of the trade" in the Commission's order dated June 3, 1974;

(5) Replies filed by respondent railroads July 22, 1974, to petitions in (3) and (4) above; and revised reply filed August 9, 1974;

(6) Letter of Penn Central Transportation Company dated August 14, 1974, requesting construction that Penn Central may apply proceeds of the rate increase to current maintenance programs;

(7) Replies filed pursuant to our order dated August 28, 1974, by American Bakers Association; Pacific Northwest Traffic League; National Industrial Traffic League; General Mills, Inc.; Illinois Grain Corp., FS Services, Inc.; The Fertilizer Institute; Bethlehem Steel Corporation; The Construction Aggregate Rail Shippers Conference, Inc. (CARS); The CECO Corporation; AMAX, Inc.; Hormel & Co., Oscar Mayer & Co., John Morrell & Co., Rath Packing Co.; American Textile Manufacturers Institute, Inc., North Carolina Textile Manufacturers Assoc., Inc., South Carolina Textile Manufacturers Assoc., Inc., Georgia-Alabama Textile Traffic Assoc., Inc.; Wedron Silica Division of Del Monte Properties, Co.; Property Owners' Committee (coal interests); and Firestone Tire & Rubber Company; and a reply filed August 28, 1974, by John G. Troiana, Trustee of the property of the Lehigh and Hudson Railway Company, Debtor, in opposition to Penn Central's prior request for relief; and

It appearing, That as indicated in our order dated August 21, 1974, various railroads in reorganization seek modification of the July 18, 1974, order to permit the transfer of funds segregated in Account 716, Capital and Other Reserve Funds, to Account 701, Cash, if necessary to meet cash requirements for continued operation of such railroads;

It further appearing, That similar requests for relief for railroads in reorganization were presented at oral argument and in (6), above;

It further appearing, That respondent railroads, in their supplemental petition described in our order dated August 21, 1974, and at oral argument, request clarification and amendment of the Commission's orders to accomplish the following two purposes:

(1) To permit funds obtained from the Ex Parte No. 305 increase to be used for new or increased maintenance and capital improvement programs; and
(2) To permit bankrupt and marginal roads to use funds obtained from the Ex Parte No. 305 increase, if necessary, to meet cash requirements for continued operation.

It further appearing, That by reply to the railroads' supplemental petition filed August 20, 1974, the Chesapeake and Ohio Railway Company, The Baltimore and Ohio Railroad Company and Western Maryland Railway Company (Chessie System) indicated that the amendments proposed above do not

represent the position of the Chessie System which contends it should "be entitled to use such revenue [from the authorized increases] for any valid corporate purposes;"

It further appearing, That the petitioners in (1) and (2) above, in said petitions and at oral argument, request modification of outstanding orders to permit the revenues derived herein to be used for any capital improvements or maintenance projects which improve the quantity or quality of railroad service, whether or not delayed or deferred;

It further appearing, That other petitioners, including the Chicago and Northwestern Transportation Company and the Chicago South Shore and South Bend Railway Company seek reconsideration or modification of our orders in the respects set forth in our order dated August 21, 1974;

It further appearing, That the Florida East Coast Railway Company contends unrestricted use of the revenues from the increase should be permitted for a carrier whose expenditures for maintenance and capital improvements exceed the average of the railroad industry;

It further appearing, That the accounting and reporting requirements as defined and specified in the order of July 18, 1974, are necessary for the Commission to be informed about the extent of deferred maintenance and delayed capital improvements which must be overcome to provide adequate and improved service to shippers, as specifically identified as of June 30, 1974, by railroad management;

It further appearing, That, as previously indicated, the Commission intends that revenues generated by the increases authorized herein, over and above the amount specified for increased material and supply costs, other than fuel, be used by respondents *exclusively* for reducing deferred maintenance of plant and equipment and delayed capital improvements in order that rail service to the shippers be improved; however, should the situation of a particular carrier require special treatment, application should be made to the Commission and the matter will be considered on an individual basis;

It further appearing, That although some of the shippers and shipper associations replying herein are opposed to any modification of our orders, a number of replicants, including the National Industrial Traffic League, recognize that the *particular* circumstances of a *particular* carrier might warrant relief, provided such relief is accorded on the basis of an individual petition or application served upon all parties setting forth the justification therefor, and that the parties are afforded an opportunity to reply;

It further appearing, That in the event the funds to be segregated in Account 716, Capital and Other Reserve Funds, pursuant to the orders entered in this proceeding, exceed the dollar amount of deferred maintenance or delayed capital improvements "as specifically identified as of June 30, 1974, by railroad management" then it would be consistent with the intention of the Commission if such excess funds in Account 716 were to be expended for new and addi-

tional capital improvements over and above those presently undertaken, scheduled or otherwise committed, provided that specific evidence as to such proposed expenditures shall be submitted in advance for approval to the Commission, Division 2;

And it further appearing, That it would serve no useful purpose to deny the use of funds segregated in Account 716, Capital and Other Reserve Funds, should a transfer to Account 701, Cash, become imperative for continued operation and sufficient funds are not available from other sources;

It is ordered, That railroads in reorganization may transfer funds segregated in Account 716, Capital and Other Reserve Funds, in accordance with accounting instructions in the July 18, 1974 order, to Account 701, Cash, provided other funds are not available and the transfer is necessary to meet cash requirements for continued operation, and that a report shall be filed with the Commission, Division 2, immediately upon the transfer showing the date of transfer, amount of funds transferred, and full explanation of the circumstances giving rise to the necessity for such transfer;

It is further ordered, That any railroad not in reorganization which finds it imperative to expend the funds generated by the authorized increase for operating purposes to avoid curtailment of transportation service or to avoid the filing of a petition in reorganization may make application to the Commission, Division 2, for approval of the proposed transfer and use of such funds, said application to be

accompanied by supporting financial and statistical information and a certification that the funds are necessary for the purposes aforesaid;

It is further ordered, That railroad respondents, if any, which are unable to use the full amount of the funds generated by the increase for deferred maintenance or delayed capital improvements, as defined in this proceeding, may expend such funds for new and additional capital improvements providing advance approval is obtained from the Commission, Division 2, as above set forth;

It is further ordered, That any petitions for relief or other pleadings filed in this matter shall be served upon all parties, and the parties shall be afforded an opportunity to file representations in response thereto within 10 days from the date of service, prior to which time action will not be taken on any proposed transfer except in the case of an extreme emergency;

It is further ordered, That the petitioning electric railway, Chicago South Shore, may report the information required in the Commission's order of July 18, 1974, using the account numbers provided for such items in the uniform system of accounts for electric railways in lieu of the account numbers for railroad companies shown in the Appendices to the order.

It is further ordered, That in all other respects, the petitions detailed in our order dated August 21, 1974, and the petitions and contentions above described be, and they are hereby, denied for the reason that sufficient grounds have not been presented

to warrant the action sought, without prejudice, however, to further requests for relief pursuant to the procedures hereinabove set forth.

And it is further ordered, That noice of this order shall be given to the general public by depositing a copy in the Office of the Commission's Secretary and by filing a copy with the Director, Office of the Federal Register, for publication in the Federal Register.

By the Commission.

ROBERT L. OSWALD
Secretary

[SEAL]

APPENDIX M

SERVICE DATE
Jun. 12, 1975

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 6th day of June 1975.

EX PARTE NO. 305

NATIONWIDE INCREASE OF TEN PERCENT IN FREIGHT RATES AND CHARGES, 1974

Upon consideration of the railroads' petition filed May 8, 1975, requesting the Commission to make permanent the general increase authorized in this proceeding and further requesting the Commission to eliminate the conditions previously imposed in connection with use of the funds from the increase; the separate petition filed May 8, 1975, by the Chessie System Lines also seeking permanent establishment of the Ex Parte No. 305 increase; and the replies filed by Archer Daniels Midland Company, The National Industrial Traffic League, Consumers Power Company, and the National Council of Farmer Cooperatives, on May 20, May 27, and May 28, 1975, respectively;[1]

It appearing, That petitioners contend that the revenues generated by Ex Parte No. 305 are crucial

[1] A number of additional replies, filed May 28, 1975, have also been considered.

to their continued operation, and that elimination of existing limitations upon the use of the funds would provide more flexibility which is needed in view of existing economic conditions;

It further appearing, That while several replicants urge cancellation of the increase, all strenuously oppose any extension of the increase unless the conditions imposed by the Commission, designed to improve rail service, are continued in effect, and that replicants assert such action would constitute an unjustified windfall to the carriers in view of the fact that only 3 percent of the 10 percent increase was justified on the basis of costs;

It further appearing, That following oral argument before the Commission an order was entered relieving railroads in reorganization from using the funds in the manner specified in the orders of June 3, 1974 and July 18, 1974, and setting forth procedures to be followed by railroads not in reorganization seeking similar relief;

It further appearing, That the Commission has received and acted upon numerous requests for relief filed in accordance with our order dated October 3, 1974;

It further appearing, That upon consideration of request for relief, for the reasons set forth in the individual orders, the Commission granted the following carriers relief on the date indicated:

Grand Trunk Western Railroad Company	December 17, 1974
Bessemer and Lake Erie Railroad Company	January 22, 1975
The Lake Terminal Railroad Company	

Union Railroad Company	
Birmingham Southern Railroad Company	
Carbon County Railway Company	
Duluth, Missabe and Iron Range Railway Company	
Elgin, Joliet and Eastern Railway Company	February 5, 1975
McKeesport Connecting Railroad Company	
Youngstown and Northern Railroad Company	
Chicago, Rock Island and Pacific Railroad	February 28, 1975
Chattahoochee Industrial Railroad	March 5, 1975
Newburgh and South Shore Railway Company	March 19, 1975
Chicago South Shore and South Bend Railroad	March 19, 1975
Sandersville Railroad Company	April 25, 1975
Chicago, Milwaukee, St. Paul and Pacific Railroad Company	April 25, 1975
Richmond, Fredericksburg and Potomac Railroad Company	April 29, 1975

It further appearing, That upon consideration of other requests for relief, for the reasons set forth in the individual orders the Commission denied the following carriers relief on the date indicated:

Durham and Southern Railway Company	March 5, 1975
Soo Line Railroad Company	March 5, 1975
Detroit, Toledo, Ironton Railway Company	March 18, 1975
Utah Railway Company	April 17, 1975
The Arcata and Mad River Rail Road Company	April 29, 1975
Durham and Southern Railway Company (For further consideration)	May 27, 1975

It further appearing, That the procedures established pursuant to our order of October 3, 1974, have provided an adequate basis for determining whether relief from the prescribed conditions is warranted,

while affording all parties an opportunity to make their views known;

It further appearing, That the railroads have shown a need for continuation of the Ex Parte No. 305 increase, but have not shown sufficient cause for elimination of the conditions imposed in regard to the use of funds (over the amount specified for increased material and supply cost and increased income taxes) for deferred maintenance and delayed capital improvements, the purposes for which the increases were granted on the basis of the carriers' representations;

And it further appearing, That, unless otherwise extended, the Ex Parte No. 305 increase is scheduled to expire June 30, 1975;

It is ordered, That the June 30, 1975 expiration date for the Ex Parte No. 305 increase be, and it is hereby, extended so as to expire with April 30, 1976 unless otherwise ordered by the Commission.

It is further ordered, That in all other respects the petitions be, and they are hereby, denied.

AMENDMENT TO SPECIAL PERMISSION NO. 74-3440 AUTHORIZING CERTAIN DEPARTURES FROM THE COMMISSION'S PUBLISHED TARIFF REGULATIONS

It is ordered, That Special Permission No. 74-3440, as amended, be, and it is hereby, further amended, so as to provide that all rule relief authorized shall expire on April 30, 1976.

It is further ordered, That petitioners be, and they are hereby, authorized to publish and file a supplement to the master tariff of increased rates and charges for the purpose of extending the expiration date from June 30, 1975, to April 30, 1976, upon not less than fifteen days' notice to the Commission and the public, such supplement to be considered exempt from the terms of rule 9(e) of Tariff Circular No. 20.

And it is further ordered, That in all other respects, the terms of the original permission, as heretofore amended, shall remain the same.

By the Commission.

RICHARD W. KYLE
Acting Secretary

[SEAL]

VICE CHAIRMAN O'NEAL, dissenting in part:

I would allow 7 percent of the rate increase authorized by the Commission in Ex Parte No. 305 to lapse as of June 30, 1975. Reports filed by the railroads for the last six months of 1974 indicate that total deferrals (deferred maintenance and delayed capital investment) increased by $27.3 million. New deferrals are increasing faster than old deferrals are overcome. The carriers appear to be reducing their customary level of expenditures for maintenance and capital investment to offset the Ex Parte No. 305 revenues segregated in Special Account No. 716. The net result is that the conditions which the Commission imposed in this proceeding are without effect. The purpose of the Commission's action in granting the 7 percent of the sought increase in Ex Parte No. 305 which was not cost justified has been frustrated. The Commission should authorize further applica on of only 3 percent of the increase.

COMMISSIONER GRESHAM, dissenting in part:

I have consistently opposed the Commission's dilution of the original conditions specified in our orders of June 3, 1974, and July 18, 1974. If those initial conditions were reimposed, I would extend the expiration date of the 10-percent increase for the 10-month period approved by a majority of the Commission.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 592209 28